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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

No. 1409.

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HENRY W. JAEHNE, APPELLANT,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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**FILED OCTOBER 22, 1888.**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 22, 1888.

1 To a justice of the Supreme Court of the United States or a judge of the circuit court of the United States for the southern district of New York:

The petition of Henry W. Jaehne for a writ of *habeas corpus* respectfully shows unto your honor that he is deprived of his liberty by Augustus A. Brush, Esq., warden of the State prison of the State of New York, at Sing Sing, in the southern district of New York, and that he is thus held in custody in violation of the Constitution of the United States.

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

Your petitioner was convicted in the court of oyer and terminer of the city and county of New York on the — day of May, 1886, of the crime of bribery, committed as a member of the common council of the city of New York, and was sentenced to be imprisoned in said State prison for the term of nine years and ten months on the 20th day of May, 1886, and entered upon such imprisonment on the 21st day of May, 1886, by virtue of a commitment, a copy of which is annexed.

The only authority of law for said sentence upon said conviction is a statute of the State of New York, passed July 1, 1882, and known as the "consolidation act," and especially the 2143rd

2 section thereof, by force of which the "penal code," otherwise inapplicable, is made to apply to said offence, and thereby the offence is made punishable, although committed before the "consolidation act" took effect, as well as when committed after, indifferently and indistinguishably, by a maximum imprisonment of ten years in State prison, whereas before that act took effect said offence was punishable by a maximum imprisonment in the penitentiary of two years.

Said provisions of law are entire and can only be given effect by a construction which operates to increase the punishment and burden of crimes committed before their enactment and declared operation and effect. Said law is therefore *ex post facto* and void under the provisions of the Constitution of the United States and cannot in any manner justify the imprisonment of your petitioner.

Your petitioner has served the full term of imprisonment which could lawfully be imposed by any valid provision of law, making the deduction of four months, to which, for his good behavior, he is entitled.

Your petitioner has exhausted his remedies to correct the injustice complained of in the courts of the State of New York, as will fully appear by reference to the opinions of the judges of the court of appeals of the State of New York rendered upon his appeal from said judgment in 103 N. Y., 182, which he makes a part of this his petition as if the same were annexed thereto.

Your petitioner therefore alleges that the commitment aforesaid, based upon said judgment, is null, void, and of no force or

3 validity, and prays that your honor do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, warden as aforesaid, requiring him to produce the body of your petitioner before your honor, or the said circuit court, or the Supreme Court of the United States, at some time to be designated in said writ, there to abide what shall be awarded by your honor or said court in the premises.

And at the same time he prays your honor to issue the writ of certiorari to the court of oyer and terminer of the city and county of New York, and the clerk thereof, commanding it or him forthwith to certify to your honor or said court true copies of the indictment, record, orders, judgment, and commitment in the said court remaining under or by virtue of which your petitioner is now deprived of his liberty by authority of that court.

And your petitioner will ever pray, &c.

HENRY W. JAEHNE.

JOSEPH A. THOMPSON,
*Attorney for Relator*, 140 *Nassau St., New York.*

COUNTY OF WESTCHESTER, *ss:*

Henry W. Jaehne, being duly sworn, says: I am the petitioner named in the foregoing petition; I have read the same and know its contents, and the same is true to the best of my knowledge, information, and belief.

HENRY W. JAEHNE.

Sworn before me this 27th day of April, 1888.

[L. S.] H. C. WESTLAKE,
*Notary Public in and for Westchester Co., N. Y.*

4 At a court of oyer and terminer holden in and for the city and county of New York, at the city hall of the said city, on Thursday, the 20th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable George C. Barrett, one of the justices of the supreme court of the State of New York, justice of the oyer and terminer.

THE PEOPLE OF THE STATE OF NEW YORK
*against*
HENRY W. JAEHNE.

On conviction by verdict of bribery.

Whereupon it is ordered and adjudged by the court that the said Henry W. Jaehne, for the felony aforesaid, whereof he is convicted, be imprisoned in the State prison at hard labor for the term of nine years and ten months.

A true extract from the minutes.

J. SPARKS, *Clerk.*

Endorsed: U. S. circuit court, so. dist. of New York. *Ex parte* Jaehne. Petition for writ of *habeas corpus*, &c. Roger M. Sherman, of counsel for relator, 140 Nassau St.; Joseph S. Thompson, att'y for relator, 140 Nassau St., New York. U. S. circuit court. Filed May 17, 1888. John A. Shields, clerk.

5 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of HENRY W. JAEHNE for a Writ of *Habeas Corpus.*

On reading and filing the petition of Henry W. Jaehne herein and on motion of Joseph A. Thompson, attorney for the petitioner, it is ordered that the district attorney for the city and county of New York show cause before the circuit court of the United States for the southern district of New York, in the court-room thereof, in the city of New York, room 73, in the post-office building, at 2 o'clock in the afternoon, on the 25th day of May, 1888, why a writ of *habeas corpus* and certiorari should not be issued pursuant to the prayer of the petition.

Dated New York, May 17, 1888.

CHAS. L. BENEDICT, *Judge.*

Endorsed: U. S. circuit court, so. dist. of N. Y. *Ex parte* Jaehne. Rule to show cause. Roger M. Sherman, of counsel, 140 Nassau St.; Joseph A. Thompson, att'y for relator, 140 Nassau St., New York. Motion adjourned on application of dist. att'y to Friday next, the 1st of June, 1888, at 2 p. m. Chas. L. Benedict. U. S. circuit court. Filed May 19, 1888. John A. Shields, clerk.

6 United States Circuit Court, Southern District of New York.

In the Matter of the Petition of HENRY W. JAEHNE for a Writ of *Habeas Corpus.*

JUNE 11, 1888.

BENEDICT, *J.:*

This is an application for a writ of *habeas corpus* to bring before this court Henry W. Jaehne for the purpose of enquiring as to the legality of his detention in the State prison, where he is confined under a sentence of the supreme court of the State of New York.

The petitioner was indicted and convicted under the provisions of section 72 of the penal code of New York for the crime of bribery committed by him while a member of the common council of the city of New York. Pursuant to that provision of statute he was sentenced to be imprisoned in the State prison for the term of nine years and ten months, two years of which term have already expired.

The application for relief from that judgment at the hands of this court is based upon the proposition that section 72 of the penal code, with the force and effect given it by section 2143 of the consolidation act, under the decision of the court of appeals, is an *ex post facto*

law, and therefore void, because contrary to the Constitution
7 of the United States. In considering this proposition it is to be observed that the question so earnestly discussed in behalf of the prisoner, whether section 58 of the consolidation act was made of no effect, and section 72 of the penal code, by section 2143 of the consolidation act, made the law in cases of aldermanic bribery in the city of New York, is not presented for the decision of this court by this application. The petitioner is not imprisoned by virtue of section 58 of the consolidation act, but by virtue of section 72 of the penal code. The power of this court to relieve him from imprisonment, therefore, depends upon the validity of section 72 of the penal code, as given effect by the court of appeals. If that provision of the statutes of the State be valid the prisoner cannot be released by this court, whatever may be the opinion of this court as to the correctness of the conclusion of the court of appeals that the law applicable to the prisoner's case was to be found in section 72 of the penal code and not in section 58 of the consolidation act. It is thus apparent that the question presented to this court by the present application relates to section 72 of the penal code, and to that alone. In determining the validity of that section any construction given to it by the court of appeals is controlling, and the decision of the court of appeals in O'Neil's case, where the indictment was under the same statute, must therefore be observed.

In that case the court of appeals declared that section 72 of the penal code was to be construed as prospective only in its
8 operation. This construction put upon a statute of the State by the highest court of the State, in the only case where the precise question has been distinctly presented, must be followed by this court on this occasion under the familiar rule that the construction of a State statute adopted by the highest court of the State is regarded as part of the statute by the national courts. It may be added that if the question whether section 72 of the penal code was prospective in its operation were open to decision here, no ground is discovered upon which to reject the construction adopted by the court of appeals, in view of the positive language of the penal code.

Following that construction and holding, as I am bound to hold, that the statute under which the prisoner is confined is prospective only in its operation, the question presented by the petitioner is reduced to this, namely, whether a statute, in force at the time when the offence was committed, which increases the punishment of that crime, but is prospective alone in its operation, is an *ex post facto* law. On that question there is nothing to be said.

The motion for a writ of *habeas corpus* is denied.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the petition of Henry W. Jaehne for a writ of *habeas corpus*. Decision. Benedict, J. U. S. circuit court. Filed Jun. 13, 1888. John A. Shields, clerk.

9 At a stated term of the circuit court of the United States for the southern district of New York, held in the United

States court building, in the city of New York, on the 1st day of October, 1888.

Present: Hon. Charles L. Benedict, judge.

In the Matter of the Petition of HENRY W. JAEHNE for a Writ of *Habeas Corpus.*

The petition herein coming on to be heard upon filing the same and the order to show cause granted thereon, after hearing Roger M. Sherman, Esq., in support of said petition, and John R. Fellows, Esq., district attorney for the county of New York, opposed—

Ordered that the prayer of said petition be, and the same hereby is, denied.

CHAS. L. BENEDICT.

(Endorsed:) U. S. circuit court, southern dist. of New York. In the matter of the petition of Henry W. Jaehne for a writ of *habeas corpus.* Order denying petition. Joseph A. Thompson, att'y for pet'r, 140 Nassua St., New York. U. S. circuit court. Filed Oct. 1st, 1888. John A. Shields, clerk.

10 In the Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of HENRY W. JAEHNE for a Writ of *Habeas Corpus.*

The petitioner above named conceiving himself aggrieved by the final decision and order entered on the 1st day of October, 1888, in the matter above entitled, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record, proceedings, and evidence in said matter, duly authenticated, may be sent to said Supreme Court.

ROGER M. SHERMAN,
*Attorney for Petitioner*, 140 *Nassau St., New York.*

The foregoing appeal is allowed. It is ordered that a transcript of the petition and proceedings thereon be forthwith sent by the clerk of the said circuit court to said Supreme Court of the United States at Washington, in the District of Columbia.

Dated New York, October 3, 1888.

CHAS. L. BENEDICT,
*District Judge.*

11 [Endorsed:] U. S. circuit court, so. dist. of N. Y. In the matter of the petition of Henry W. Jaehne, &c. Appeal. Roger M. Sherman, att'y for app'l't, 140 Nassau St., New York. U. S. circuit court. Filed Oct. 5, 1888. John A. Shields, clerk.

12 UNITED STATES OF AMERICA, *ss:*

To the people of the State of New York, to John R. Fellows, Esq., district attorney for the city and county of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 22d day of October, 1888, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry W. Jaehne is appellant and The People of the State of New York are appellees, to show cause, if any there be, why the judgment or order in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, on the 3 day of October, 1888.

CHAS. L. BENEDICT.

13 [Endorsed:] U. S. circuit court, so. dist. of New York. In the matter of the petition of Henry W. Jaehne, &c. Citation. U. S. circuit court. Roger M. Sherman, att'y for app'l't, 140 Nassau St., New York. Filed October 5, 1888. John A. Shields, clerk.

14 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the petition of Henry W. Jaehne for a writ of *habeas corpus* as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 18th day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the said United States the one hundred and thirteenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1409. Henry W. Jaehne, appellant, *vs.* The People of the State of New York. Filed October 22, 1888.

# Supreme Court of the United States.

HENRY W. JAEHNE, APPELLANT,

*v.*

THE PEOPLE OF THE STATE OF NEW YORK, APPELLEES.

OCTOBER TERM, 1888.

*No.* 1409.

*Motion to Advance.*

This is a criminal case, coming here by appeal in *habeas corpus* from U. S. Circuit Court, Southern District of New York.

Appellant is imprisoned in State prison.

Counsel for both parties have filed a stipulation that the case be set down for hearing October 29, or as soon thereafter as the court may order.

Appellant moves accordingly.

ROGER M. SHERMAN,
*of Counsel for Appellant,*
140 *Nassau Street, N. Y.*

OCTOBER 22, 1888.

# SUPREME COURT OF THE UNITED STATES.

HENRY W. JAEHNE,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellees.*

## BRIEF FOR APPELLANT.

ROGER M. SHERMAN,

*Counsel for Appellant,*

140 Nassau Street.

New York.

# SUPREME COURT OF THE UNITED STATES.

HENRY W. JAEHNE,
Appellant,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees.

October Term, 1888.
No. 1,409.

*Appeal from an order of the Circuit Court, Southern District of New York, denying Appellant's petition for writs of habeas corpus and certiorari.*

## BRIEF FOR APPELLANT.

STATEMENT AND SPECIFICATION OF ERROR.

This appeal involves the question of the constitutionality of an amendment to the Penal Code of the State of New York, passed after that code was enacted and four months after it went into effect, extending its operation over the intermediate period of four months, and changing the punishment for that period, in the class of offenses and offenders here involved, from two years in the penitentiary to ten years in State Prison. This

offence is bribery committed by a member of the Common Council of New York City The provision of law thus made operative to increase the punishment and burden of crimes, committed before the Consolidation Act went into effect, is Section 72 of the Penal Code, under which ostensibly the appellant is deprived of his liberty.

That section did not go into effect as to members of the Common Council of the City of New York on December 1, 1882, *by its own force;* but, if at all, on April 1, 1883, retroactively by operation of Section 2143 of the Consolidation Act ; a section which was enacted by Chap. 67, Laws of 1883, February 26, 1883. The Consolidation Act embodies special laws applicable to New York City, and although not in form, was, in legal effect, an amendment and part of Section 72, as construed by the Court of Appeals in this case.

The particular acts here charged were alleged to have been committed in 1884.

It is thus evident that the particular crime was committed after the last enactment went into effect—*so far as it ever went into effect ;* it has been, therefore, sought to dispose of the question by the plausible comment that a law cannot be *ex post facto* as to a crime committed after its passage. But that answer assumes the very question to be determined.

When a legislative provision for the punishment of crime, in any of its operations exceeds the limits of legislative power and is indivisable, and the necessary discrimination has to be made at the trial, so that the rights invaded can only be protected by repeated judgments against the validity of the law ; *although there may be a class of cases to which it might properly apply*, the provision is *wholly* void.

The law here in question is thus retroactive and there-

fore *ex post facto* and wholly void; and being void, is not valid as to the offense here in question.

The petition below sets forth that the petitioner is imprisoned in the State prison of the State of New York, in violation of the Constitution of the United States; that he was convicted in the Court of Oyer and Terminer of the crime of bribery, committed as a member of the Common Council of the City of New York and sentenced to be imprisoned in said State Prison for nine years and six months; that he has been thus imprisoned since May 21, 1886; that the only authority of law for said sentence is a statute of the State of New York, passed July 1, 1882, known as the "Consolidation Act," and especially the 2,143d section thereof, by force of which the Penal Code, otherwise inapplicable, is made applicable; and thereby the offense is made punishable whether committed before the passage of said "Consolidation Act," or committed after, indifferently and indistinguishably, by a maximum imprisonment of ten years in State prison; whereas, before that act took effect, said offense was punishable by a maximum imprisonment of two years in the penitentiary; that said provisions of law are entire and can only be given effect to increase the punishment and burden of crimes committed before their enactment and declared operation and effect; that said law is therefore *ex post facto* and void under the provisions of the Constitution of the United States and cannot in any manner justify the imprisonment of the petitioner; that he has served the full term of imprisonment which could lawfully be imposed by any valid provision of law; that he has exhausted his remedies in the Courts of the State, and he makes the decision of the Court of Appeals, in his case, 103 N. Y., 182, a part of his petition.

No traverse was made below, and his petition was disposed of as upon demurrer.

The District Attorney, for the appellees, has formulated our contention in this way:

"That Section 100, Chap. 335, Laws of 1873, with its maximum of two years' imprisonment, was prior and up to the 1st day of December, 1882, the law applicable to crimes of bribery committed by members of the Common Council of the City of New York, and that it has ever thereafter continued to be, and is now, the law to be applied to such crimes, unless it was repealed by the Penal Code when it went into operation and effect upon December 1, 1882; that Section 100, Chap. 335, 1873, was by the terms of the Penal Code, *as it read when it first took effect* on December 1, 1882, excepted from the operation of the Penal Code, and was not then and thereby repealed by virtue of any repealing force which the Penal Code *then* possessed; that the claim of repeal by the Penal Code on December 1, 1882, must rest upon the theory of *an after acquired nunc pro tunc* repealing force and effect conferred upon the Penal Code on the 1st day of April, 1883, by Section 2143 of the Consolidation Act, which that day went into operation and effect; that to claim for the Penal Code such a *nunc pro tunc* repealing force and effect, increasing the imprisonment to ten years, would be to claim for it a retrospective and *ex post facto* force and effect; and the allowance of such a claim, and the giving to the Penal Code of such a force and effect, increasing the punishment from two years to ten, would be giving it an *ex post facto* operation and effect as to crimes of bribery committed in the city of New York by members of the Common Council thereof, at any time during the period of four months between December 1, 1882, when the Penal Code went into operation and effect, and April 1, 1883, when the Consolidation Act went into operation and effect."

The Court below disposed of petitioner's contention

limiting its consideration to Section 72 of the Penal Code, alone, declining to consider the question argued, of the effect of the Consolidation Act; and determined that a decision of the Court of Appeals, in the case of People *vs.* O'Neil, 109 N. Y. 251, subsequent to this case, where that Court passed upon the present contention adversely, was controlling upon the Circuit Court.

The limit of the examination below was, therefore, too narrow as an original question, inasmuch as it regarded the language of the Penal Code without consideration of the body of the law in *pari materia*; and the decision below proceeded upon an erroneous theory in giving a controlling effect to the decision of the Court of Appeals.

The reason assigned for subordinating the determination of the Circuit Court to that of the Court of Appeals is the same assigned in the *dissenting* opinion for the same conclusion in

Butz *vs.* City of Muscatine, 8 Wall., 584,

and this determination and the reason assigned are directly in conflict with that case and several others in this Court.

While a writ of *habeas corpus* is not a writ of error, yet where the error pervades the jurisdiction over the subject matter,—the very power of the Court to impose the sentence,—the question may be raised by writ of *habeas corpus*.

Where a controlling premise in the determination is a construction of a state statute in disregard of the mandate of the federal constitution the federal Courts may review that question. The rule invoked by Judge Benedict doubtless applies as a rule of decision in trials at law in the Courts of the United States. But in cases of appellate, or substantially appellate, jurisdiction, when the very question ~~at~~ to be determined, is whether the

State Court has proceeded upon a controlling error upon a federal question, then it is no answer to say that the State Court has so decided, nor is it any answer that the State Court has determined that the question does not arise; nor, in cases of contract, that there is no contract to be impaired; nor that the objection is obviated in some other way.

In the exercise of appellate power every element involved is a matter of original inquiry here, and the decision of the State Court receives the deference due to its reasoning, but is not controlling as authority.

## Points.

### I.

IT IS PROPER, AT THE OUTSET, TO RECALL THE AUTHORITATIVE DEFINITIONS OF AN *ex post facto* LAW, AND TO INDICATE THEIR APPLICATION HERE.

In Calder *vs.* Bull, 3 Dall., 390, Chase, J.:

"I will state what laws I consider *ex post facto* laws within the words and intent of the prohibition. * * Second. Every law that aggravates a crime or makes it greater than it was when committed. Third. Every law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; but I do not consider any law *ex post facto* within the provision, which mollifies the rigor of the criminal law, but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction."

In *ex parte* Garland, 4 Wall., 391, Miller, J.:

"This exposition of the nature of *ex post facto* laws has never been denied."

Now, to indicate the foundation here, for the application of this definition—

The Penal Code, when it went into effect December 1, 1882, by its terms (Sec. 725), provided that "NOTHING in this Code affects ANY of the provisions of all acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporations;" but continued them in force, "except so far as appealed or affected by *subsequent* laws, notwithstanding the provisions of this Code."

At that time an act of the enumerated description was in force in the city of New York (Ch. 335 of the Laws of 1873); by the 100th section of which the offense of bribery charged in this indictment, was punishable by a *maximum* imprisonment of two years in the penitentiary.

After the Penal Code took effect, and until a "subsequent law," the CONSOLIDATION ACT (from December 1, 1882 to April 1, 1883), for a period of four months, the offense in question was punishable under Sec. 100, Ch. 335, of 1873.

That offence, committed between December 1, 1882, and April 1, 1883, was thus, if prosecuted to conviction before the latter date, punishable by the *maximum* imprisonment of two years in the penitentiary, while after that date, by force of the construction given in the JAEHNE CASE to Section 2143 of the CONSOLIDATION ACT, which then went into effect, the same crime was punishable by a *maximum* imprisonment of ten years in the State Prison.

The result of the construction in the JAEHNE CASE is, that Section 2143, applying the Penal Code to a case to which it did not before apply, increases the punishment

of an offence committed before it took effect. The body of the law is, thus, within the definitions of the Constitutional prohibition, *ex post facto*, and void.

## II.

THE EXCESSIVE SENTENCE IS VOID FOR WANT OF JURISDICTION; AND REVIEWABLE UPON HABEAS CORPUS.

Windsor *vs.* McVeigh, 93 U. S., at pp. 282, 283.

Peo. *ex. rel.* Tweed *vs.* Liscomb, 60 N. Y., 559.

## III.

IT IS THE RIGHT AND DUTY OF THIS COURT TO REVIEW, AS AN ORIGINAL QUESTION, THE EFFECT OF SECTION 2143 OF THE CONSOLIDATION ACT UPON THE BODY OF THE LAW; AND AS A NECESSARY COROLLARY, TO DETERMINE FOR ITSELF WHAT IS THE CORRECT VIEW OF THE BODY OF LAW UPON WHICH SECTION 2143 OPERATES. THE OPINION OR JUDGMENT OF THE STATE COURTS IS WITHOUT AUTHORITY IN THE REVIEW OF THESE QUESTIONS.

In Butz *vs.* The City of Muscatine, 8 Wall, 582, this Court said:

* * * * * * * *

"It is the duty of this Court to decide the questions

involved in this class of cases when presented for decision. This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part by blindly following in the footsteps of others and substituting their judgment for our own.

"Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge and defeat the wise and provident policy of the Constitution which called this Court into existence.

* * * * * * * *

"It has been suggested * * that we are concluded by the more limited interpretation of the provisions of the code which has been given to them by the Supreme Court of the State.

"To this we think there are several answers:

1. In all the cases brought here under the 25th Section of the Judiciary Act, this Court has never hesitated to determine for itself the construction and effect of any statute of a State brought under review without reference to the previous adjudications of the highest Court of the State upon the subject.

* * * * * *

"Questions which are identical may be brought here in both ways; under such circumstances, it will hardly be insisted that State adjudications are to control in one case and not in the other.

* * * * * *

"Here, the remedy is taken away; not by a subsequent repeal, but by subsequent judicial decisions. The effect upon the contract is the same as if the provisions of the code had been repealed.

This Court construes all contracts brought before it for consideration, and in doing so, its action is inde-

pendent of that of the State Courts, which may have exercised their judgment upon the same subject. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State, does not affect the legal result. We are of the opinion that under the Statutes of Iowa, * * the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other."

Williams v. Bruffy, 96 U.S.

In ~~Bridge Proprietors vs. Hoboken, 1 Wall., at p. 144,~~ at p. 183 this Court says:

"The prohibition applies to any act to which the State, by its enforcement thereof, gives the force of law."

Allen *vs.* Louisiana, 103 U. S., at p. 639.
Wright *vs.* Nagle, 101 U. S., at p. 794.
Ohio L. & T. Co. *vs.* Debolt, 109 U. S., 244–256.
Douglass *vs.* County of Pike, 101 U. S., at p. 687.
Louisville Co. *vs.* Palmer, 109 U. S., at p. 256.
Grenada Co. Supervisors *vs.* Brogden, 112 U. S., 269.
Rice *vs.* Railroad Co., 1 Black, 360.
Delmar *vs.* Ins. Co., 14 Wall., 668.
U. S. Rev. Stat., Sec. 721.

By that section (Sec. 34 of the Judiciary Act) the laws of the several States are prescribed as rules of decision in the Courts of the United States only in trials at common law; and, only then, when the Constitution,

statutes or treaties of the United States do not otherwise require or provide.

In Ohio L. & T. Co. *vs.* Debolt, this Court says, Taney, C. J. :

"It would be impossible for this Court to exercise any appellate power in a case of this kind unless it was at liberty to interpret for itself the instrument relied on as a contract between the parties."

In Douglass *vs.* County of Pike, this Court says :

"We always regret to find ourselves in conflict with the Courts of the States in matters affecting local law, but, when necessary, we cannot refrain from acting on our own judgment, without abrogating our constitutional functions."

In Burgess *vs.* Seligman, 107 U. S., 33, the Court says :

"It can hardly be contended that the Federal Court was simply to register their decision; or that the judgment of the Circuit Court should be reversed merely because the State Court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so ; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion."

In Pease *vs.* Peck, 18 How., U. S., 595, this Court says :

"There are, it is true, many *dicta* to be found in our decisions averring that the Courts of the United States are bound to follow the decisions of the State Courts on the construction of their laws. But although this may be a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly our reports furnish many cases of exceptions to it.

* * * * * * * *

"When the decisions of the State Court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an *excited public opinion has elicited new doctrines subversive of former safe precedent.*

"Cases may exist also when a cause is got up in a State Court for the very purpose of anticipating our decision of a question known to be pending in this Court.

* * * * * * * *

"Such decisions have not the character of established precedent declarative of the settled law of a State.

"Parties who, by the Constitution and Laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the Court."

It results from these, and many more decisions that this Court must consider whether Section 2143 of the Consolidation Act, in the operation given to it by the Court of Appeals, imposes upon the body of the law an *ex post facto* effect; to determine that question, this Court must also examine the statutes *in pari materia*, and determine as an original question, independently of the State Courts, whether those statutes, in the absence of the 2143d section, fail to justify the result. If this Court, in its independent judgment, is of the opinion that these questions must be answered affirmatively, it is the right and duty of this Court to so declare, and to apply its writ to effectuate this determination.

Judge Rapallo declares (103 N. Y., p. 203) that:

"The present controversy would never have arisen, but for a peculiar provision of the Consolidation Act contained in section 2143 of that act."

The mandate of that section is, obviously, a controlling principle in the decision of the Court of Appeals. It is obvious that an inseparable element of the inquiry is, whether there is any basis in the proper construction of the statutes *in pari materia* for the punishment here complained of, without the assistance of section 2143. We submit that there is no such basis. This Court is now asked to declare that the effect given to that peculiar and indispensable provision is in conflict with the Federal Constitution.

Williams *vs.* Oliver, 12 How. U. S., 125.
Klinger *vs.* Missouri, 13 Wall., 257.

This Court, then, having possession of the cause with power to enforce the mandate of the Constitution, in respect of "any act to which a State by its enforcement thereof, gives the force of law," and the error being in a judicial decision, and not, as we contend, in the statute, it follows that this Court should give to the State law, the construction which will sustain its validity rather than the one which which will render it inoperative and void:

Ogden *vs.* Saunders, 12 Wheat., 270.
Grenada Co. Supervisors *vs.* Brogden, 112 U. S., 269.
Chew Hong *vs.* U. S., *Ibid.*, 536, 549, 550.

## IV.

THE INQUIRY IS NOT LIMITED TO THE QUESTION OF THE VALIDITY OF SECTION 72 OF THE PENAL CODE, MERELY BECAUSE THE RECORD DECLARES THAT THE PRISONER IS IMPRISONED BY VIRTUE OF THAT SECTION.

In *habeas corpus* a Federal Court may go behind the

commitment and inquire into the cause of the commitment.

*Ex parte* Jenkins, 2 Wall. Jr., 521.
*Ex parte* Sifford, 5 A. L. Reg., 659.
*In re* Wing Yung, Quy, 2 Fed. Rep., 624.
*Ex parte* McCready, 1 Hughes, 598.

It is a settled rule of construction of statutes that the formal division of statute is unimportant. Acts and their amendments are regarded as constituting but one enactment.

Harrell *vs.* Harrell, 8 Fla., 46.
Ashley *vs.* Harrington, 1 D. Chip. (Vt.), 348.
Com. *vs.* Goding, 3 Metc., 130.
Bryant *vs.* Livermore, 20 Minn., 313.
U. S. *vs.* Freeman, 3 How., U. S., 556.

Several statutes that are *in pari materia* are to be constructed as one statute, in explaining their meaning and intent.

1 Kent Com., 463.
Patterson *vs.* Winn, 11 Wheat., 385, 386.
The Harriet, 1 Story, 251.
U. S. *vs.* Collin, 3 Blatch., 325.
Bank *vs.* Collector, 3 Wall., 495.
Virginia Coupon Cases, 114 U. S., at p. 304.

## V.

THE DECISION OF THE COURT OF APPEALS SUSTAINING THE IMPRISONMENT HERE IMPOSED IS MADE TO DEPEND UPON SECTION 2143 OF THE CONSOLIDATION ACT, AS A CONTROLLING PRINCIPLE TO REACH THEIR JUDGMENT.

The controlling proposition in the opinion of the Court of Appeals, in People *vs.* Jaehne, 103 N. Y., 182, 189, the principle of the decision, the starting point, is that Section 2143 of the Consolidation Act, subordinates that act to the Penal Code.

The language of Section 2143 referred to is "for the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is to be deemed to have been enacted January 1, 1882; all acts passed after such date, and the Penal Code, are to have the same effect as if passed after this act."

The Court of Appeals determined, what it is unnecessary to question here, that there was an irreconcilable conflict between Section 72 of the Penal Code and Section 58 of the Consolidation Act (an unvaried re-enactment of Section 100 of the Charter Act of 1873), and that these sections could not co-exist That Court held that the question which law should yield must be determined by the question: Which was the later will of the legislature? That Court decided that, although the Consolidation Act is, in fact, the later enactment, although the Penal Code was directed to take effect December 1, 1882, and the Consolidation Act, to take effect April 1, 1883; and although the Consolidation Act, by this same Section 2143 expressly provided that: "This act shall not affect any offence committed * * prior to the time when *it* takes effect;" nevertheless,

"There being no question of legislative power, it is the plain duty of courts to construe the two statutes in accordance with this direction."

To emphasize our contention that this section is the essential and controlling element in the result reached by the Court of Appeals in this case, that Section 2143 is the platform upon which this imprisonment of ten years rests, observe what the two dissenting Judges say (103 N. Y., p. 203):

"The present controversy would never have arisen but for a peculiar provision of the Consolidation Act, contained in Section 2143 of that act. * * *

The effect of this section is the question now before us."

Elsewhere, in the opinion of the majority of that Court in this case, there is no assertion of any independent repeal force in the Penal Code. We challenge criticism of our assertion that the whole argument there proceeds from this dominant idea; there is no assertion of *independent* repealing force in other provisions. The idea entirely is that the adoption of this controlling principle can be *harmonized* with those sections which, the defence urged, were in conflict with the decision. There is everywhere the tacit admission that, but for Section 2143, the argument in favor of Section 100 of 1873 or 58 of the Consolidation Act might well prevail. All other provisions were referred to *in the way of argument* as sustaining the conclusion previously adopted as one compelled and obligatory, by force of Section 2143.

Thus the Court of Appeals says: "Notwithstanding the generality of the language of Section 725, it is apparent from other provisions *of the Consolidation Act*, and of the Penal Code, that it was not intended that all penal provisions in charter acts should remain in force, unaffected by the Penal Code."

Again: "This limitation upon the generality of the language of that section is *required upon construing it in connection with other provisions.*"

## VI.

THE PENAL CODE IS INAPPLICABLE TO THE OFFENCE OF BRIBERY COMMITTED BY A MEMBER OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, EXCEPT AS IT IS MADE APPLICABLE BY THE CONSTRUCTION OF SECTION 2143 OF THE CONSOLIDATION ACT. SECTION 100 OF CHAP. 335 OF THE LAWS OF 1873, IMPOSING A MAXIMUM IMPRISONMENT OF TWO YEARS IN THE PENITENTIARY, WAS THE LAW APPLICABLE THERETO UNTIL APRIL 1, 1883, WHEN SECTION 2143 WENT INTO EFFECT. SECTION 2143 GIVES EFFECT TO SECTION 725 OF THE PENAL CODE, AND NOT TO SECTION 72; AND SECTION 100 OF 1873 AND 58 OF THE CONSOLIDATION ACT, AFFORD THE MEASURE OF PUNISHMENT.

The Penal Code was enacted July 26, 1881. By its 72d section the offence of bribery committed by "a judicial officer, a person who exercises any of the functions of a public office, not designated in Titles VI and VII of that Code" (that is, an officer of the State, or a member of the legislature), "or a person employed by, or acting for, the State, or for any public officer in the business of the State," was punishable by imprisonment for ten years in State Prison. By the 704th section it was provided that the provisions of the Penal Code respecting imprisonment "shall not apply to a case where special provis-

ion is made by statute as to the punishment of any particular offence or class of offences or offenders."

By Sec. 100 of Chap. 335 of the Laws of 1873, special provision *was* then made that a member of the Common Council of the City of New York guilty of bribery should be punished by two years imprisonment in the penitentiary.

By its 719th section the Penal Code provided that "an offense specified by this code must be punished according to the provisions of this code and not otherwise." Conversely, it followed that an offense, excluded, as was this, from its punishments, could not be regarded as specified, by the Penal Code.

By its 725th section the Penal Code provided that "nothing in this code affects any of the provisions of all acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporations," but continued them in force, "except so far as repealed or affected by *subsequent* laws, notwithstanding the provisions of this code."

By Section 726, the repealing clause of the Penal Code, provision was made for the repeal of inconsistent acts, "so far as they impose any punishment for crime; *except as herein provided.*"

By Section 727 of the Penal Code it was provided that the act should take effect December 1, 1882; but that "when construed in connection with other statutes, it must be deemed to have been enacted *on the fourth day of January, 1881*, so that any any statute enacted after that day is to have the same effect as if it had been enacted after this Code."

We lay stress upon this date, the date when the legislative comparison and adjustment of the Penal Code to other statutes ended. The apparently plain direction of Section 725 has been, by a refinement and substitution of words, by the Court of Appeals in this case ad-

justed to the view which starts and ascends from Section 2143 of the Consolidation Act. This direction to regard January 4, 1881, as the end of the comparison and adjustment of the Penal Code to other statutes is of the utmost importance here, in view of the then existing statutory condition of the special laws of New York City; a condition entirely overlooked, and now presented for the first time; a condition which imperatively enforces the plain language of Section 725, and gives it the fullest effect as saving Section 100 of the preceding corporate act from the operation of Section 72 of the Penal Code.

Prior to the enactment of the Penal Code it had been provided by Chap. 536 of the Laws of 1879, passed June 20, 1879, entitled "An Act to provide for a compilation and revision of laws of the State of New York affecting public interests in the City of New York," that:

Sec. 1. Commissioners be appointed to compile and revise all the special or local laws affecting public interests in the City of New York, which shall be in force at the time such Commissioners shall make their final report. Sec. 2. That when the Commissioners shall have completed the compilation and revision of the statutes, they shall submit a copy to the legislature for the year 1880, with suggestions and recommendations respecting such contradictions, omissions and imperfections as may appear in the original text.

This commission made their report in two books entitled "Special and Local Laws affecting New York City"; and by Chapter 595, of the Laws of 1880, passed June 26, 1880, it was enacted that this volume may be read in evidence and cited in any Court or proceeding, as containing presumptively all special or local laws affecting public interests in force in the City of New York, January 1, 1880.

This volume contained, Chap. 335, Laws of 1873, enti-

tled "An Act to reorganize the local government of the City of New York"; by Section 100 of which, the offense in question committed "by any member of the Common Council * * after his election * or before or after he should have qualified and taken his seat or entered upon his duty" was made punishable by a maximum imprisonment of two years in the penitentiary and a fine; and the officer was disqualified "from holding any public office, trust or appointment under the City of New York," and forfeited his office.

By Chap. 594, Laws of 1880, passed June 26, 1880, entitled "An Act to provide for the revision of the special and local laws affecting public interests in the City of New York," it was enacted Sec. 1. That Commissioners be appointed to revise all the special or local laws affecting public interests in the City of New York, which shall be in force at the time such Commissioners shall make their final report or at such time prior thereto as said Commissioners shall find advisable.

* * * * * * * *

That copies should be distributed to those whose advice is desirable, and thereafter the revision should be submitted to the legislature.

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The report under this act was submitted by the Commissioners to the legislature, May 23, 1881.

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The compilation and revision referred to have been sent to the library of this Court, by George Bliss, Esq., one of the Commissioners, at my request.

It thus becomes plain that the whole subject of the statutes affecting New York City was in the hands of this Commission, to be put in shape for legislative con-

sideration, until after January 1, 1880; that the legislature as near to January 4, 1881, as July 26, 1880, made the compilation evidence of the existing law, including Sec. 100, of the Corporate Act of 1873. It is reasonable to suppose that such an enactment would not have been made if the legislature had in contemplation so soon after to change this law. It is contended, by appellees, however, that as soon after as January 4, 1881, the legislature had matured its intention that Sec. 100 should be *repealed* by Sec. 72. But it is further evident that this same body of law and compilation was, on the same 26th of July, 1880, when it was continued by statute as in force, referred again to the Commission, to be put in consolidated shape for re enactment, with the evident intention that the whole question should yet remain in *abeyance*, and be acted upon by the next legislature. The report under the Act of July 26, 1880, was made May 23, 1881, two months prior to the enactment of the Penal Code, and over four months after the declared end of the comparison and adjustment of the Penal Code to other statutes. The whole subject of special laws in force in New York City was thus placed out of consideration and so remained until after January 4, 1881; and when this subject came again into the hands of the legislature, on the 23d of May, it considerately enacted the Penal Code with the express declaration in Sec. 727 that January 4, and not any later day, should be the test as to what was in the contemplation of the legislature in its adjustment of inconsistent provisions and repeal by implication.

These statutes, and the *status* of this whole subject matter, at the time the Penal Code passed from the consideration of the legislature, which have been utterly ignored in the State Courts, clearly show that the saving clause, Sec. 725, meant just what it said. In other words, the Penal Code, when it went into

operation, and, as it read when it first took effect, on December 1, 1882, did not repeal section 100 of chap. 335 of the Laws of 1873, by any repealing power which it then possessed; but section 100 of 1873 was *excepted* from the operation of the Penal Code by its section 725. Any claim of repeal by the Penal Code, or of operative force of section 72 of that Code, against this offense, must rest upon an *after* acquired *nunc pro tunc*, repealing force, conferred upon the Penal Code on April 1, 1883, by section 2143 of the Consolidation Act.

This is the inference to which legal reasoning, no less than the plain language of the statute conducts.

The Penal Code is an institute of criminal justice for the entire State, and is operative upon persons generally; the Charter Act of 1873 is of effect only in the city of New York, and section 100 touches only officers of the city. These laws move in different orbits and cannot clash or conflict. They are, therefore, subject to the rule of construction, that a later general act does not repeal a prior local, or special act, unless the legislative intent to repeal be unequivocally expressed.

People *vs.* Quigg, 59 N. Y., 83.
*In re* Company, 69 N. Y., 209.
Village *vs.* Howell, 70 N. Y., 284.
*In re* Evergreens, 47 N. Y., 216.
*In re* Goddard, 94 N. Y., 544.
People *vs.* Catholic Protectory, 38 Hun, 127; 101 N. Y., 195.
U. S. *vs.* Claflin, 97 U. S., 546.

The Penal Code was enacted upon the report of a commission.

The Legislature adopted the language of the Penal Code Commissioners in section 725, and it is proper to observe the note of those Commissioners (note to section 786 of the report of the Commissioners of the Penal Code, p. 286). They say:

"The Commissioners have provided by section 2, that from the time when the Code takes effect, no person shall be punished criminally, except as provided by this Code, *or by some statute which it specifies as continuing in force.*

"In the section of the text (725), they enumerate the statutes *which are intended to be continued.* * * *

"The acts enumerated in the above section are, for the most part, local or special in their character, *and proper to be continued as separate laws, rather than to be incorporated in the Code.*"

A later statute in the affirmative shall not take away a former act; and *eo potius*, if the former be particular and the latter, general.

Gregory's Case, 6 Coke, part 6, p. 19.

General legislation on a particular subject must give way to special legislation on the same subject.

State *vs.* Mayor, 33 N. J. L., 61.
State *vs.* Branin, 3 Zab., 484.

"No intent of the legislature to repeal or interfere with special statutes applicable to the city of New York can be implied from general legislation upon the subject * * * Laws special and local in their application are not deemed repealed by general legislation, except upon the clearest manifestation of the legislative intent."

People *vs.* Quigg, 59 N. Y., 88.

"When the legislature pass a particular act and declare under what circumstances, in what manner and to what extent individuals shall be liable under that act, the intendment is that they are liable under these provisions only, and do not fall within the provisions of former general acts. Subsequent general acts, although

their language is sufficiently broad and comprehensive for such purpose, will not control the provisions of prior special statutes, unless the legislature so intended."

Rochester *vs.* Barnes, 26 Barb., 662.
Plank Road Co. *vs.* Allen, 16 Barb., 15.
Webber *vs.* Bank, 2 Daly, 406.
Com. *vs.* Kimball, 21 Pick., 375.
*In re* Goddard, 16 Pick, 504.

"If the provisions of a special charter or a special authority, derived from the legislature, can reasonably well consist with general legislation, whose words are not absolutely inharmonious with it, the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case."

State *vs.* Stoll, 17 Wall., 425.
Townsend *vs.* Little, 109 U. S., 504.

The efficacy of a law, begins when it goes into operation, and not at the date of its enactment.

McLaughlin *vs.* Page, 8 N. Y. State Rep., 367.

In the absence of section 2143, the Penal Code went into operation December 1, 1882, and the Consolidation Act went into effect April 1, 1883.

Thus the Consolidation Act is the later act, and assuming the inconsistency which the Court of Appeals asserts between section 58 of that act, and section 72 of the Penal Code, the latter section must give way. The principle of implied repeal invoked, is erroneously stated

in the opinion of the Court of Appeals, and is made to turn upon the relative *enactment* of the two statutes. Ordinarily, of course, there is the same relation and priority between the enactment, and the operation of two statutes ; and then the rule is thus stated with sufficient accuracy. But here it is important to state that principle more accurately. The doctrine of implied repeal is that two inconsistent statutes covering the entire field, cannot be in force at the same time ; the *operation* of the later one displaces the operation of the earlier.

The Court of Appeals finds in section 2143, a rule of construction, and asserts that it is controlling.

But an accurate statement of the rule of construction, does not justify the result, reached by that Court.

While the Consolidation Act and Penal Code may be *construed* as if the Penal Code were later than the Consolidation Act, no *construction* can override the express provisions as to when those laws shall, respectively *take effect*. The Penal Code which is to *take effect* December 1, 1882, cannot repeal the Consolidation Act, which is not to *take effect* until April 1, 1883 ? In other words, the Consolidation Act cannot *take effect for the purpose of being repealed*, before the time when it can *take effect* for any other purpose. No such repeal can be reached by *construction* of THE RELATIVE EFFECT OF THE PENAL CODE AS A LATER ACT, UPON THE GROUND COVERED BY THE OTHER. When the Consolidation Act expressly provides that it shall *take effect* on April 1, 1883, no punishment can be inflicted under its authority before that time ; and although the Penal Code be regarded as enacted after the Consolidation Act, its provisions, so far as they take effect, must *take effect* before the latter.

If a prosecution for bribery like this had been instituted between January 1, 1882, and April 1, 1883, to what statute would it be referred for

support? It could have derived no force from the Consolidation Act, for that was not then *in effect.* Until December 1, 1882, it could have derived no force from the Penal Code, for *that* was not, until then, *in effect.* Such a prosecution must necessarily have been referred to Section 100 of chapter 335 of the Laws of 1873.

The question is as to the effect of Section 72 of the Penal Code on section 100 of chapter 335 of the Laws of 1873; this must be resolved without aid from Section 2143 of the Consolidation Act. But Section 58 of that *act, by continuing Section 100 of 1873, until April 1, 1883*, and by declaring that "this act shall not affect any offence committed prior to the time *when it takes effect*," removes it from the operation of the Penal Code.

Section 72 of the Penal Code does not cover the whole subject of Section 100; the two statutes are not identical in substance. This is not apparent upon reading the opinion in the JAEHNE CASE; but upon referring to the statute it appears that the opinion possibly proceeds upon an erroneous assumption in that particular. Section 72 leaves unpunished a "CLERK," and "AN OFFICER, BEFORE HE SHALL HAVE QUALIFIED AND TAKEN HIS SEAT OR ENTERED UPON HIS DUTY;" which are within the terms of Section 100 and Section 58.

Suppose some person is charged with paying bribes upon a record which convicts him of bribing these Aldermen *on the 31st of December, 1883.* They have not "qualified or taken their seats or entered upon their duties." Yet they are known. They hold the certificate of the Board of County Canvassers. On January 1, 1884, they will have qualified and become officers. It will serve the same purpose to bribe them on December 31, as on January 1. Is it safer? If Section 72 has repealed Section 100, or Section 58, there can be but one

answer. Section 72 only applies to "officers." That is *qualified* officers. They are to forfeit any office *held* by the offender.

The exact direction of section 2,143 is that in construction with the Consolidation Act, the Penal Code is, "to have the same effect as if *passed* after this act."

That direction, it would seem, would be satisfied by giving effect to the Section 725 of the Penal Code quite as well as by giving effect to Section 72, and refining away Section 725. To regard Section 725 of the Penal Code as intended to retain Section 58 of the Consolidation Act, as immediately succeeding Section 100 of the Charter Act of 1873, would be, in the fullest sense, to give the Penal Code the same effect as if passed after the Consolidation Act. This view consistently sustains a policy which had obtained for twenty-five years, making the punishment for bribery in the class of city officials less than that in the category of State officials.

This view leaves no such *hiatus* as is necessarily, and as the Court of Appeals concedes to be, the result of *its* construction.

The direction of Section 727 of the Penal Code, to regard it, for construction, as if enacted January 4, 1881, applies to Chap. 335 of 1873. The result of such a comparison, upon the rule laid down by the Court of Appeals here, would be to repeal Sec. 100 of 1873, as of January 4, 1881, while there would be nothing in its place until December 1st, when Section 72 became operative.

In the case of People *vs.* O'Neil,——N. Y.—, that Court says:

"The alternative conclusion would be that the legislature, in repealing Section 100 of the charter by the enactment of the Penal Code, *had inadvertently omitted to except from the operation of the repealing statute, cases of bribery committed by municipal officers of New York, prior to the enactment.*"

Our view of Section 2143 of the Consolidation Act further relieves the legislature from the absurdity pointed out by Judge Rapallo (p. 204): "The absurdity of enacting Section 58 and inserting in the same act a provision which would prevent its operation."

The incorporation of Section 100 of 1873, into the Consolidation Act, Sec. 58 was the strongest reaffirmance and continuance of it.

Davies *vs.* Fairbairn, 3 How. U. S., 636.

This view, still further, avoids an encroachment by the Court upon the functions of the legislature. The public policy, contended for by the Court of Appeals, of making the punishment for bribery uniform, may be obvious enough as a consideration addressed to the legislature; but, as Judge Rapallo points out, it is not found in the statute, but the opposite policy is firmly imbedded there.

The earliest New York statute which expressly relates to the crime of bribery committed by a member of the Common Council of any city, is chapter 539, Laws of 1853. This act adds such officers by name to the enumeration of the Revised Statutes, and thus subjects them to a maximum imprisonment of ten years for this offence.

The next general act is chapter 747 of 1869, which applies to "any person holding office under the laws of this State;" and changes the maximum imprisonment to five years.

While this statute of 1853, remained in force, Chap 446 of 1857 was passed. It was entitled, "An act to amend the

Charter of the City of New York;" and by its 52d section it punished the offense of bribery committed by "municipal officers in the city of New York," by a maximum imprisonment of two years in the penitentiary.

The next statute on the subject was Chap. 137 of 1870, and by its 114th section, "a member of the Common Council" was specified; the maximum imprisonment remaining as before, two years.

The succeeding charter acts, Chap. 335 of the laws of 1873, Sec. 100; the compilation of laws in force, January 1, 1880, Chap. 595 of 1880; the revision as reported May 23, 1881, Sec. 56, under Chap. 494, laws of 1880; and the enactment of the revision report in the Consolidation Act, retained Sec. 114, Chap. 137, laws of 1870, intact, the maximum imprisonment remaining at two years in the penitentiary.

At the same time the General Act of 1869 had been embodied in the Penal Code, and the maximum imprisonment of State officials for this offense, fixed at ten years in State Prison.

Then to emphasize the extraordinary vacillation attributed by the Court of Appeals to the Legislature, in this case, upon so grave a question of public policy, in the Charter of the City of Albany, Chap. 298, Title XVIII, Sec. 6, laws of 1883, after the passage of the Penal Code, there being no ground upon which it can be pretended that the provisions of that act are affected by the Penal Code, the legislature enacted that the maximum imprisonment for the offense of bribery committed by a member of the Common Council of that city, should be two years in the penitentiary.

This Court has said that the object of the legislature is a proper subject of inquiry.

Ruggles *vs.* Illinois, 108 U. S., 526.

An additional purpose and effect for section 2143, in harmony with the legislative power, is not difficult nor far to seek.

We have already argued that the subordination of the later statute was in view of Section 725 and not Section 72, of the Penal Code. Further support for this view is found in Section 2143 of the Consolidation Act (amended Feb. 26, 1883, by Ch. 67, Laws of 1883), which carefully declares that certain enumerated sections are "intended only to contain the substance of certain sections of the Code of Civil Procedure or of the Code of Criminal Procedure, or of amendments thereof, and shall not be construed as making any new enactment, or as repealing, modifying, amending or superseding any provision of either of said Codes, or any amendments thereof, but shall be treated and considered as embraced in this act, solely in order that it may contain all provisions of existing laws which are of special application in the city of New York. Sections 1371–1376, &c., shall in like manner be treated and considered as making no new enactment, but as embraced in this act for the same reason." In the same context then follows the provision that the Penal Code shall be construed as the later enactment.

Without the limitations and declarations quoted from Sec. 2143, it might, to say the least, have been contended that the Consolidation Act was obnoxious to provisions of the State Constitution. Article III, Section 16, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Section 2143 was accordingly entirely devoted to preserve all the provisions of the act from that danger. *Noscitur a sociis.*

In some cases this purpose was accomplished by an express disclaimer of any but a local or declaratory

effect for enumerated sections. Now, the purpose being thus apparent, the application of the rule contended for by Judge Rapallo is fortified, as by that rule the penal provisions of the Consolidation Act are, as they were intended to be, preserved. At the same time, this purpose, once apparent, satisfies all the conditions stated in the majority opinion for the admitted application of that rule.

Section 2143, read in the light of the State Constitution and the title of the act, indicates that the legislature considered and intended all its provisions "as of special application in the city of New York," and, as such, to preserve them. The Court of Appeals admits (103 N. Y., p. 194) the application of the rule that "a posterior, general act does not repeal a prior local act unless the legislative intent to repeal be unequivocally apparent;" provided "the special law was part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment of a subsequent general rule covering the same subject."

Here is not merely a declared local application; the Penal Code becomes a later act, a *subsequent* general rule, only by force of Sec. 2143 of the Consolidation Act, and that same section amounts to this, that while the Consolidation Act, as the later act, *might* be construed as legislating upon the subject of the Penal Code, which, as a local law, it could not do, the precaution shall be taken to remove all ground for such a construction by declaring the Consolidation Act for purposes of construction as the earlier act, and that by the express direction of Section 725 of the Penal Code, the Consolidation Act is not upon the same subject as the Penal Code. Section 2143 of the Consolidation Act is thus confined to its constitutional functions to limit its own

operation within its constitutional boundaries, and is not objectionable as giving to the Penal Code any effect which without it that law might not have.

It seems to us that the dissenting opinion in the Court of Appeals in this case is the more philosophic discussion; that the majority opinion proceeds by forced and labored argument, that the language of this Court in Pease *vs.* Peck, 18 How., 595 indicates that

"An excited public opinion elicited new doctrines subversive of former safe precedent; ~~that~~ it has not the character of established precedent declarative of the settled law of a State."

The minority view had, before this case, been sustained by such, and so many decisions, as to have become the settled law of the State.

For example:

The decision of the General Term of the Supreme Court in the case of the People *vs.* Cath. Protectory, 38 Hun, 135, affirmed by the Court of Appeals, 101 N. Y., 195, says:

DANIELS, J., DAVIS, P. J., concurring:

"A police justice of the city of New York, on the 5th day of November, 1884, committed John Van Heck, a boy of the age of nine years, to the Catholic Protectory for begging in the streets, in violation, as the commitment asserted, of the Consolidation Act of 1882, and the Penal Code, and of the Code of Criminal Procedure."

"If these provisions continued, and were at the time of the commitment of the child in force, it was unlawfully detained in the asylum, and should have been discharged under the writ of *habeas corpus*.

They were in form, as well as language, made a part of the Consolidation Act of the city of New York, enacted in 1882. They were thus re-enacted after the enactment of the Penal Code, which by its own direction

is to be deemed to have been enacted on the 4th of January, 1881, to take effect on the 1st of ~~May~~ Dec., 1882 (Penal Code, sec. 727).

It is true that by the last paragraph of section 2143 of the Consolidation Act, the Penal Code is declared to have the same effect as if it were in fact passed after the Consolidation Act. *But it could not have been intended by this provision that these other provisions inserted upon this subject in the Consolidation Act should be repealed or annulled by anything contained in the Penal Code. This act was enacted when the Penal Code was within the knowledge and was in the mind of the Legislature, and these sections would not have been made a part of the Consolidation Act if it had been intended that the previously enacted Penal Code should annul or repeal them. They were considerately made a part of the Consolidation Act intending that they should be observed and enforced; and the circumstance that this Act was in this way subordinated to the Penal Code could not have been designed to defeat that intention.*"

In the same case, the Court of Appeals, 101 N. Y., 106, says:

"There is no provision for his discharge unless the requirements of the charter of the Protectory, which determine how long he may be held by that institution, are unrepealed and remain applicable to the case.

* * * * *

He is met by the contention of the Protectory that the commitment is final. * * * And that is said to result from the effect of Section 291 of the Penal Code, which is claimed to have made unavailing and inapplicable the wise and prudent provisions of the charter of the Protectory. * * *

For the construction of the Penal Code, which makes the commitment absolute and final and sweeps out a

part of the terms on which the institution can receive and hold the child, must necessarily sweep them all out, and among the rest Section 1623 of the Consolidation Act. * * *

The provisions relating to the Protectory are found in the Consolidation Act, and were substantially copied from the charter of the institution passed in 1863, and subsequent acts amending it. * * *

Section 1623 we have already referred to as providing for a discharge by the corporation. * * *

The section of the Penal Code which is said to override and change all this is as follows: * * *

There is nothing in this section which repeals by implication any of the provisions of the Consolidation Act. * * *

"*A further rule of construction points to the same result. The provisions of the consolidation act defining the authority of the protectory are local and special, confined to the City of New York, and having respect to its situation and needs. The provision of the Penal Code is general and applies to the State at large. It is the uniform rule that such a special and local act is not repealed or modified by the later general one, unless some specific words plainly disclose that intention. We are bound to apply these rules, and especially so in a class of cases which involve questions of personal liberty and parental control. A construction which stands upon the Penal Code alone and rejects the influence and modifying effect of the charters is very clearly shown to be inadmissible.*"

*The whole jurisdiction of police magistrates in the city of New York* depended upon this principle of construction applied to these statutes in

*In re* McMahon, 1 N. Y. Cr. R., 58.

And Judge Lawrence adopted the construction of sec-

tion 725 of the Penal Code to save that jurisdiction, which is in the Jaehne case denied.

The penal character of *assaults* was made to depend upon the same construction in

People *vs.* Bernardo, 1 N. Y. Cr. R., 247, 248.

And Recorder Smythe had no difficulty in adopting the same construction of section 725 of the Penal Code.

In the Jaehne case Judge Andrews avoids the reasoning of these opinions, as to section 725, by a resort to section 726; he says (p. 198), that section 726 "clearly disproves the contention that that section 725 was intended to apply to and preserve unimpaired all the penal provisions in charter acts."

But he is compelled to read section 726 with changes in its language, which it is well settled are not permissible.

Section 726 reads in the statute book:

"All acts or parts of acts which are inconsistent with the provisions of this act are repealed so far as they impose any punishment for crime *except as herein provided.*"

The leading idea of this section is "repeal."

It was in section 725, provided that the Penal Code should not "affect any of the provisions of acts of incorporation or amending acts of incorporation of municipalities, or charter acts, but that such acts should remain in force, notwithstanding the provisions of the Penal Code."

Yet Judge Andrews says:

"The true meaning of the phrase 'except as herein provided,' would, I *apprehend*, have been more clearly expressed by the wolds 'other than as herein provided.'"

We invite attention to the logical absurdity of the statement that any claim is 'clearly disproved' by a statute

which does not itself 'clearly express' the meaning ascribed to it by the speaker."

This mode of reaching a clearer expression was condemned in Hall *vs.* Supervisors, 66 How. P. 330. It was said:

"The Court has no power to nullify words and to supply others, in order to give force to a supposed legislative intent."

See also

Potter's Dwarris on Statutes, 193.
McCloskey *vs.* Cromwell. 11 N. Y. 593, 601.

In Doe *vs.* Considine, 6 Wall., 459, this Court said, "when the language is unambiguous, a Court cannot, arguing from a general intent, transpose clauses and show a different meaning."

The Court of Appeals, even before the Cath. Protectory Case was fully committed to the saving construction of sections 724 and 725 of the Penal Code, in the case of

People ex rel. McDonald *vs.* Keeler, 99 N. Y. p. 474 (Oct. 1885).

Rapallo, J.: "It is claimed on the part of the relator, that the provisions of the Revised Statutes relative to contumacious witnesses were superseded and abrogated by the Penal Code which took effect December 1, 1882. The argument presented is that by section 69 of the Penal Code it is declared that a person, who, being present before either house of the Legislature or any committee thereof authorized to summon witnesses, willfully refuses to be sworn or affirm or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers or documents in his possession or under his control, is guilty of a misdemeanor.

"Sec. 719 provides that an offense specified in this

Code committed after the beginning of the day when this Code takes effect, must be punished according to the provisions of this Code and not otherwise.

"And Sec. 726 enacts that all acts and parts of acts, which are inconsistent with the provisions of this act, are repealed, so far as they impose any punishment for crime, except as herein provided.

"It is urged that the refusal of a witness to answer before a Legislative committee, being by the Code made a crime, punishable by the Court as a misdemeanor, the provisions of the Revised Statues making such refusal punishable as a contempt, are abrogated, and the two statutes cannot co-exist for two reasons: First, because no person can be punished twice for the same offense; and secondly, because by the express provisions of Sec. 719, an offense for which the Code prescribes a punishment cannot be punished in any other manner.

"Throwing out of view the provisions of 2 R. S. 278, and of the Penal Code Secs., 680, 681, which permits the punishment of criminal contempts both by indictment and by proceedings for contempt, as applicable only to contempts of courts and not to contempts of the Legislature, the first of these reasons is answered by Sec. 677 of the Penal Code * * *

"*The answer to the second reason assigned is to be found in Section 724 of the Penal Code, which was not referred to on the argument and which declares that this code does not affect any power conferred by law upon any Court Marshal, or other military authority or officer, to inflict punishment upon offenders, nor any public body, tribunal or officers to impose or inflict punishment for a contempt, nor any provisions of the laws relating to apprentices, &c.*

"It seems to us that it was the intent of this section to retain in full force the provisions of the Revised Statutes conferring authority upon the two houses of

which does not itself 'clearly express' the meaning ascribed to it by the speaker."

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"It seems to us that it was the intent of this section to retain in full force the provisions of the Revised Statutes conferring authority upon the two houses of

the Legislature to impose punishment for the specified contempts."

There is not an argument advanced by Judge Andrews to defeat the saving force upon Section 58 of the Consolidation Act of Section 725 of the Penal Code, which is not answered by the opinion and conclusion in the cases, of People *vs.* McDonald and The Catholic Protectory.

In McKenna *vs.* Edmonstone, 91 N. Y., 231, it was held that the General Mechanics' Lien Law, 1880, Ch. 486, did not repeal the Special Mechanics' Lien Law of the city of New York, 1875, Ch. 379. The Court says:

"It is well settled that a special and local statute for a particular case or class of cases, is not repealed by a subsequent statute, general in its terms, provisions and applications, unless the intent to repeal or alter is manifest, although the terms of the general act are broad enough to include the cases in the special law. * * The Statute of 1875 related exclusively to the City and County of New York. The Statute of 1880 relates to the cities of the State, and *while the city of New York, in the absence of any other statutes upon the subject of mechanics' lien, would be deemed included within its purview, that alone is not sufficient to indicate an intention on the part of the legislature to repeal the act of 1875.*"

In McLaughlin *vs.* Page, 8 New York State Rep., 369, it is said:

"In holding, therefore, that the law of 1880 did not repeal, by implication, the law of 1875, because the latter referred to a special locality, the Court necessarily held that said law of 1880 had no application whatever to said locality."

Citing Keogh *vs.* Main, 17 J. & S., 183.

"According to the terms of the consolidation act, it was not to take effect until several months after the

filing of this lien, and in view of this provision it is immaterial when it shall be deemed to have been enacted.

* * * * * * *

" Certainly, according to the usual acceptance of language, not the date upon which an act is ' deemed to have been enacted,' but the date upon which it takes effect, is the time when it becomes operative, and after which its provisions must be obeyed."

There is a plain conflict between the decision in this case and others in the highest Court of the State, as well as the inferior Courts upon the question from which the present inquiry depends.

Judges Rapallo and Earl, in the Jaehne Case; the Court of Appeals, in the McDonald and Catholic Protectory Cases *supra*; and in McKenna *vs.* Edmundstone, 91 N. Y., 231; Judge Lawrence, in *Ex parte*, McMahon; Recorder Smythe, in the case of Bernardo and, we may add, the General Term of the Court of Common Pleas, in New York *vs.* Buel, 12 Daly, 494, and McLaughlin *vs.* Page, 8 N. Y. State Rep., 369, all assert, as a settled rule of construction, that sections 724 and 725 are to be given full effect in construing the Penal Code, and its effect upon the consolidation act; that the exception of Sec. 726, except as herein provided," is read literally; as saving from repeal, except—not punishment but—"repeal," is therein expressly provided.

Against the five justices who are authority for the penalty of ten years, here are seven against the construction on which it depends; besides the Court of Appeals itself.

Certainly, if ever there can be a case for the independent exercise of judgment by this Court, it is now at the bar.

## VII.

THE RETROACTIVE PROVISIONS OF SECTION 2143 ARE ENTIRE.

In other words, either Section 2143 was intended to effectuate the saving clause, Section 725, of the Penal Code, or it was intended to subordinate Sections 100 of 1873, and 58 of the Consolidation Act, to Section 72 of the Penal Code, by carrying them back in time to the operation of the Penal Code, December 1, 1882. Here is no case of one part of an act which can be severed from another void part. This question is limited to a single clause. In one view its very essence is retroactive, and that is its whole function. In the other view, neither in the future nor in the past, does it warrant ten years imprisonment.

In one view Section 2143 adjusts the whole body of the law to settled public policy and entire harmony with settled principles of construction and without violence to any language. In that view it enforces Section 725.

In the other view, its only purpose is to place backward in time the provisions of Section 58 of the same act, and merely to effect the repeal of that section by a rule respecting the operation of inconsistent statutes. It does not provide that on and after April 1, 1883, the Penal Code shall be the law of the case. It does not purport to change the *time* when the Penal Code shall operate. It provides that it shall operate upon an inconsistent statute by repealing it upon the arbitrary assumption that it was in force earlier than the Penal Code; an assumption arbitrary and without disguise, false and absurd.

## VIII.

THE DECISION IN THE CASE OF PEOPLE *vs.* O'NEIL, 109 N. Y., 251 DOES NOT RELIEVE THIS QUESTION FROM THE ELEMENT OF SECTION 2143, OR AFFORD REASON OR AUTHORITY TO SUSTAIN THE ORDER OF THE CIRCUIT COURT.

The opinion in that case evades the point. The Court says :

"It will be time enough to consider the application and effect of the Penal Code upon such cases when occasion arises."

But does not occasion arise when the construction of a statute is in question, to consider whether a given disputed construction leads to absurdity or, in some aspects, to conflict with the Federal Constitution ?

The Court there says, truly enough, that past cases and future cases are distinctly separable, and that a statute which refers to both may be valid as to future cases.

But this is not the alternative presented by Section 2143, but only whether the object of the retroactive provision of the section was to subordinate the Consolidation act to Section 725 of the Penal Code or to Section 72. It is true that the latter is thus applied to future cases ; but it applies to all cases, past and future, only by going back in time from April 1 to December 1, and the only possible effect of that going back is to increase the punishment from two to ten years from December 1, 1882.

The Court of Appeals does not in the O'Neil case disclaim the controlling principle deduced by them in this case from Section 2143 ; they say merely that their construction, in this case, necessarily involved the conclusion that Section 100 of 1873 was repealed by the Penal Code.

This objection to the construction adopted in this case being thus apparent and inseparable, the following principle applies:

Wynehamer *vs.* The People, 13 N. Y., 441–442, Selden, *J.:*

"If the legislature may in a single provision encroach *ad libitum* upon the Constitution, without other effect than to call upon the Courts to limit its operation to cases within the provisions of legislative power, nearly all motive for a careful regard for constitutional right in legislation would be removed and an onerous burden imposed upon the Court. * * * * *

"Where the legislative provision is indivisible and the necessary discrimination has, as in this case, to be made at the trial, so that the rights invaded can only be protected by repeated judgments against the validity of the law, although *there may be a class of cases to which it might properly apply*, the provision is wholly void.

"The law must, therefore, be revised, and the proper discrimination made before it can be enforced."

See also A. S. Johnson, *J.*, at p. 425; Denio, *C. J.*, at page 459, and all the Judges at p. 487.

Warren *vs.* The Mayor, 2 Gray, 97, 99. Shaw, *C. J.*

Hale *ex rel. vs.* Commissioners, 5 Ohio St., 506.

Campau *vs.* Detroit, 14 Mich., 276.

People *vs.* Tiphane, 3 Park., 241, 246, 247.

Cooley on Const'l Lim., 5th Ed., p. 107.

Allen *vs.* Louisiana, 103 U. S., at pages 83, 84.

Virginia Coupon Cases, 114 U. S., 269, 304, 305.

Trade Mark Cases, 100 U. S., 82.

## VIII.

THE PETITION MAKES OUT A CASE OF RIGHT TO RELIEF FROM IMPRISONMENT BY THE WRIT OF HABEAS CORPUS, ISSUED OUT OF THE CIRCUIT COURT OF THE UNITED STATES.

U. S. Rev. Stat., Secs. 716, 753.

The order appealed from should, therefore, be reversed with suitable directions for the issue of the writs as prayed.

ROGER M. SHERMAN,
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New York City.

Office Supreme Court U. S.
FILED
JAMES H. McKENNEY,
CLERK.

# *Supreme Court of the United States.*

OCTOBER TERM, 1888.

No. 1409.

HENRY W. JAEHNE,

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellees.*

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**Opinion of New York Court of Appeals, in the People *vs.* Jaehne, 103 N. Y., 102. Dissenting Opinion of Rapallo and Earl, *JJ.***

**Opinion of the Court of Appeals in the People *vs.* O'Neil, 109 N. Y., 251.**

**New York Constitution and Statutes, Referred to by Appellant's Counsel, in the Order of their Enactment.**

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ROGER M. SHERMAN,

*Of Counsel for Appellant,*

140 Nassau Street,

New York.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

*vs.*

HENRY J. JAEHNE,
Appellant.

(Argued June 24, 1886; decided October 5, 1886)

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 22, 1886, which affirmed a judgment of the Court of Oyer and Terminer of the City and County of New York, entered upon a verdict convicting the defendant of the crime of bribery.

The crime charged was that defendant, who was a member of the Common Council of the City of New York, received a bribe to vote as such member for the granting of an application by the Broadway Surface Railroad Company for leave to construct and operate a street railroad in Broadway in said city.

The material facts are stated in the opinion.

ANDREWS, J.:

The principal question on this appeal is whether the crime of bribery committed by a member of the Common Council of the City of New York is punishable under the Penal Code, or only under the New York

City Consolidation Act of 1882. The materiality of the question presented lies in the fact that the defendant was indicted and convicted of bribery, as a member of the Common Council of the City of New York, under section 72 of the Penal Code, and was sentenced to imprisonment in the State prison for the term of nine years and ten months, pursuant to the provisions of that section, whereas if it was punishable only under the Consolidation Act of 1882, the maximum punishment by imprisonment could not have exceeded two years in the Penitentiary.

After a careful consideration we have reached the conclusion that section 58 of the Consolidation Act is superseded by section 72 of the Penal Code, and that the crime of bribery committed by a member of the Common Council of the City of New York is defined and made punishable by that section. In determining this question it is to be assumed that the Penal Code was the later enactment, although in point of fact it was passed prior to the Consolidation Act. The Penal Code was passed July 26, 1881, and took effect December 1, 1882. The Consolidation Act was passed July 1, 1882, and took effect March 1, 1883. By section 2143 of the Consolidation Act expressly declares that "for the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is deemed to have been enacted on the first day of January in the year eighteen hundred and eighty-two; all acts passed after such date, and the Penal Code, are to have the same effect as if passed after this act." But the express prescription of the legislature, therefore, the Penal Code, although enacted before the Consolidation Act, is to have the same effect upon the Consolidation Act as if it had been passed after that act. This provision, although somewhat anomalous, does not, as we can perceive, transcend the

legislative power. It subordinates the Consolidation Act to the Penal Code, wherever the two statutes are in conflict, and moreover, what is material to notice, the provision affords the plainest implication that in the sense of the legislature there were or might be penal provisions in the Consolidation Act in conflict with the Penal Code. For the purpose of construction the legislature has declared in what order of time the two statutes shall be deemed to have been enacted, and there being no question of legislative power, it is the plain duty of courts to construe the two statutes in accordance with this direction.

Section 58 of the Consolidation Act is a re-enactment of section 100 of the charter of 1873, which in turn was a re-enactment of section 114 of the charter of 1870. It is sufficiently specific for our present purpose to state that the section makes it a felony for any person to give or promise to any member of the Common Council or any municipal officer, any money or valuable thing with intent to influence his official action, or for any such officer to accept any such gift or promise under any agreement or undertaking that his vote, opinion, judgment, or action shall be influenced thereby, and subjects the bribe-giver upon conviction to imprisonment in the penitentiary for a term not exceeding two years, or to a fine not exceeding $5,000 or both, in the discretion of the Court, and the bribe-taker on like conviction, to the same punishment by fine or imprisonment, or both, and in addition subjects him to a forfeiture of his office and disqualifies him from holding any office under the city of New York. Section 72 of the Penal Code is as follows: "§ 72. A judicial officer, a person who executes any of the functions of a public office and designated in titles VI and VII of this Code, or person employed by or acting for the State, or for any public officer in the business of the State, who asks, receives, or agrees to

receive a bribe, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years, or by fine of not more than five thousand dollars, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the State."

It is material at the outset to inquire whether the offense of bribery committed by municipal officers is, as a general rule, embraced within and punishable under this section of the Penal Code. If the section does not apply to the bribery of a municipal officer in any case, then plainly there is an end of the argument in support of this judgment. If, on the other hand, the section applies in general to this class of officers, then it becomes necessary in order to reverse the judgment that it should be found that the special case of bribery committed by municipal officers in the city of New York is expected or in some way taken out of the operation of this section. The comprehensive character of the provisions of the Penal Code relating to bribery, both in respect to the definition of the offense and the officers by whom it may be committed, is apparent upon the most cursory reading. They form to a great extent the subject of three titles. Title six relates to crimes against the executive power of the State, and prescribes the punishment for giving or offering bribes, or for the asking or receiving of bribes by executive and administrative officers. Title seven relates to crimes against the legislative power of the State, and contains provisions for the punishment of bribery of members of the legislature. Title eight is entitled "Of crimes against public justice." Section 71 prescribes the offense of giv-

ing or offering a bribe to a judicial officer and certain other persons enumerated, connected either with the administration of justice, or who exercise *quasi* judicial functions. Section 72, which prescribes the offense of receiving bribes, is not thus limited. It specifies judicial officers, but the specification is followed by words of the most comprehensive meaning, intended apparently to include in this final provision all public officers within the State, of whatever character or grade, not included within the previous titles. It in terms not only embraces a judicial officer, but also "a person who executes any of the functions of a public office," not designated in titles 6 and 7. That it was not the intention to confine the section to judicial officers is manifest also from the subsequent designation in the same section of "a person employed by, or acting for, the State, or for any public officer in the business of the State," and also from section 78, which supplements section 72, and prescribes the offense of giving or offering a bribe to "a person executing the functions of a public office," although the bribery of a judicial officer is specially provided for by section 71. It is plain that a member of a Common Council or other municipal officer is a person "who executes the functions of a public office," and we cannot doubt that municipal officers are within the purview of section 72. If this was less plain on the language of the section itself, there are cogent reasons for giving it this construction in view of the antecedent legislation and the presumed intention of the legislature. A reference to the successive statutes on the subject of bribery, commencing with the statute, Chapter 181 of the Laws of 1806, re-enacted by the Revised Laws of 1813, shows a constant tendency on the part of the legislature to extend the statutes against bribery to persons not embraced in previous laws. The statute of 1806 included only State officers and members of the

Senate and Assembly. The Revised Statutes (2 R. S. 760) enlarged the enumeration of State officers in the previous statutes, and for the first time included judicial officers. The amendment of 1853 (Chap. 539) still further extended the enumeration to "any member of the Common Council or corporation of any city in the State, or to the mayor, recorder, chamberlain, treasurer or comptroller of such city or any department of the government thereof." The Act of 1869 (Chap. 742) departed from the practice of special enumeration adopted in the previous statutes, and substituted words of general description, "any person holding office under the laws of this State," and the law of 1869 was in force until the enactment of the Penal Code. It will be noticed that members of a Common Council were specially included in the Act of 1853, and there can be no reason to suppose that when, in 1869, the legislature substituted a general and comprehensive description in place of a specific enumeration, it intended to exempt municipal officers from the operation of the statute of bribery.

It would seem, moreover, that there could be no general policy upon which an omission of municipal officers from the provisions of the general statute against bribery could proceed. The cities of the State embrace a large share of its population and wealth. Municipal governments exercise by delegation, within a limited sphere, and, under certain restrictions, sovereign power. They create debts binding upon the municipality, and wield the power of taxation. The danger to which public rights and private property is exposed from dishonest municipal administration is certainly as great as from corruption on the bench or in the legislature. It is inconceivable that a bribery statute of general application should be enacted which did not embrace bribery of municipal officers. We find no difficulty in reaching the conclusion that section 72 of the Penal Code applies

in general to the offense of bribery committed by municipal officers.

We are, therefore, brought directly to the main question, whether section 58 of the Consolidation Act is in force, and takes the case of bribery, when committed by a member of the Common Council of the city of New York, out of the operation of section 72 of the Penal Code, thereby requiring a different procedure, and a different punishment in the special case, from that prescribed by the general law governing the same offense when committed by a member of a Common Council in other cities of the State.

The Penal Code, as its title implies, is an institute of criminal justice of general application, and was enacted in harmony with the tendency of recent legislation, for the purpose of embodying in a single statute the system of criminal law applicable to the State, and substituting the statute so enacted in place of the great number of statutes and amendments of statutes which together, before the enactment of the Code, constituted the body of the criminal laws. In the seventh section it is declared that "this Code specifies the classes of persons who are deemed capable of crimes, and liable to punishment; the nature of the various crimes, and prescribes the kind and measure of punishment to be inflicted for each;" and it is declared in the first section that "no act or omission begun after the beginning of the day on which the Code takes effect as a law shall be deemed criminal or punishable, except as prescribed or authorized by the Code, or by some statute of this State not repealed by it." It is a plain inference from these provisions that the Penal Code was intended as a revision of the prior laws in respect to crimes, and their punishment, and as a substitute for the scattered and fragmentary legislation which preceded it. The Penal Code contains no general clause repealing prior

statutes covering the subjects embraced in its provisions. It, however, defines and prescribes the punishment for murder, larceny, burglary, and all the generally recognized offenses, and it cannot be doubted that its provisions on these subjects were intended as a substitute for similar provisions in the prior laws. On comparing the offense of bribery, as defined by the Consolidation Act, and by section 72 of the Penal Code, it will be found that all the elements of the crime as defined in the Consolidation Act are included in the definition of the same crime in the Penal Code, although the definitions in the two statutes are not identical in language. By the Consolidation Act every officer enumerated therein "who shall *accept* a gift or promise," etc., with the agreement or understanding that his vote or action shall be influenced thereby, is declared guilty of a felony. By section 72 of the Penal Code the words "receives or agrees to receive a bribe," etc., are used in place of those in the Consolidation Act. But the words in both statutes are of equivalent meaning. It was assumed on the trial that the indictment was found under the provision of the Penal Code. In point of form we think the indictment was good under either statute. It is not necessary that an indictment should follow the precise language of a statute, but words of equivalent import are sufficient, and this rule of the common law is now declared by statute. (Code of Crim. Pro., § 283.) We have then, *first*, a special provision in the charter of the city of New York, making bribery committed by a city officer a crime, and declaring its punishment, and *next*, a general law later in date (for so it must be deemed), containing provisions defining with great minuteness the crime of bribery by executive, legislative and judicial officers, and in the final section including every "person executing the functions of a public office."

The learned counsel for the defendant insists that the two acts are not necessarily repugnant, and they invoke the application to this case of the general rule in respect to the repeal of statutes by implication, that a posterior general act does not repeal a prior local act, unless the legislative intent to repeal be unequivocally apparent. Whether a subsequent statute repeals a prior one in the absence of express words, depends upon the intention of the Legislature, and one of the tests frequently resorted to, to ascertain whether there is a repeal by implication, is to inquire whether the special and general acts may both be executed without involving repugnancy of rights or remedies. In some cases the question has been solved by holding that the general act was intended to declare a general rule governing cases not already provided for, and that a prior special statute on the same subject, operating upon a single person or class of persons, or within a limited territory, should be treated as if specially excepted from the operation of the general law. It will be found I think on examining the cases in which the Courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are as a general rule cases where the Legislature was not dealing directly with the subject of the prior law, and it was not in the mind of the Legislature when the general law was enacted, or where the special law was part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment of a subsequent general rule covering the same subject. The General Bribery Act not only covers the whole subject, but was, we think, plainly intended to furnish the only rule governing the crime and punishment of bribery. It includes, by enumeration and de-

scription all officials of every grade--town, city, county and State officers—provides a uniform punishment, but gives to the Court a discretion in applying it within the limit prescribed, to meet the circumstances of the particular case. The crime of bribery is not local, affecting only a particular locality. No matter in what place the crime is committed, or whether by a town, city, county or State officer, it is an offense in the punishment of which the whole public are interested. It is peculiarly a crime against society at large. It impairs public confidence in the integrity of official administration, a confidence most necessary to be maintained. It is impossible to suppose that the Legislature, when it enacted the Penal Code, intended to exempt officials in the city of New York from the operation of the bribery sections. No public policy can be assigned for such a discrimination, and we think the case is within the rule that "a later statute, covering the same subject matter, and embracing new provisions, operates to repeal the prior act, although the two acts are not in express terms repugnant." (See *Norris* vs. *Crocker*, 13 How. [U. S.], 429; *Bartlet* vs. *King*, 12 Mass., 537, 545; *United States* vs. *Tynen*, 11 Wall., 88; *Heckmann* vs. *Pinkney*, 81 N. Y., 211, 215; *People* vs. *Gold & Stock Telegraph Co.*, 98 *id.*, 67, 78.)

The construction we have given to the Penal Code, in connection with the Consolidation Act, is greatly strengthened in view of the inconsistencies which would result from holding, that section 58 of the Consolidation Act is still in force. At the time of the enactment of the Penal Code, the charters of the cities of New York, Brooklyn and Long Island City, contained provisions for punishing bribery committed by municipal officers in those cities. (Laws of 1873, chap. 535, § 100; Laws of 1873, Chap. 863, Tit. 19, § 22; Laws of 1871, Chap. 460.) But no such provisions were contained in the charters of

Albany, Poughkeepsie, Troy, Syracuse, Rochester, Buffalo or Elmira. The General Bribery Act of 1869, which was in force until the enactment of the Penal Code, made bribery a crime when committed by "any person holding office under the laws of this State." The statute of 1869 was unquestionably superseded by the provisions of the Penal Code. Unless, therefore, municipal officers are punishable for bribery under section 72, it follows that bribery committed by municipal officers in New York, Brooklyn and Long Island City is punishable, under the special provisions of the charters of these cities, but is not an offense, and is not punishable when committed by officers of the same class in the other cities of the State. If, on the other hand, section 72, as we have endeavored to show, includes municipal officers, the contention that, nevertheless, the crime and punishment of bribery by municipal officers in the city of New York, is still governed by section 58 of the Consolidation Act, leads to an equally absurd result. It involves the necessity of ascribing to the Legislature an intention to discriminate in the punishment of bribery when com mitted by a municipal officer in the city of New York, and when committed by municipal officers in other cities, and also the further intention to punish the crime when committed in the smaller municipalities, with far greater severity than when committed by municipal officers of the most populous and important city in the Union. Such legislation is absurd in theory, and leads to injustice. It regulates punishment according to the locality of the crime, instead of by the nature of the offense. It is repugnant to the principle that laws should be equal and impartial, and ignores a natural sentiment which requires even-handed justice even in the punishment of crimes. A law punishing homicide in the city of New York by imprisonment in the State prison, and in Brooklyn by hanging, would shock the general sense, but

would not be different in principle from a law punishing bribery in one city by imprisonment in the penitentiary for two years, and in the other by imprisonment in the State prison for ten years. It is the duty of Courts in construing statutes, to avoid, if possible, a construction which leads to absurdity or manifest injustice, and the case before us calls for the application of this principle. The fact that prior to the Penal Code the same inconsistency existed between the punishment for bribery under the charter provisions, and the general bribery statute, does not, we think, make it less the duty of the Court to seek to place such a construction upon the Penal Code, as will remedy such an anomalous and unsatisfactory condition of the law.

The argument so far has proceeded upon the assumption that the Penal Code contains no express provision, saving the bribery provision in the Consolidation Act, from its operation. But it is claimed by the counsel for the defendant that Section 58 of the Consolidation Act is continued in force by Section 725 of the Penal Code. That section is as follows: "§ 725. Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code, except so far as they have been repealed by subsequent laws: 1. All acts incorporating municipal corporations, and acts amending acts of incorporation, or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers or duties of such officers; 2. All acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in Section 626 of this Code; 3. All acts for the punishment of intoxication, or the suppression of intemperance, or regulating the sale or disposition of intoxicating or spirituous liquors; 4. All acts defining and providing for the punishment of offenses not defined

and made punishable by this Code." The claim is that this section excepts from the operation of the Penal Code all penal provisions in charter acts, and that as Section 58 of the Consolidation Act is a penal provision of that character, it is excepted from the operation of the Penal Code. Notwithstanding the generality of the language of Section 725, it is apparent from other provisions, both of the Consolidation Act and of the Penal Code, that it was not intended that all penal provisions in charter acts should remain in force unaffected by the Penal Code. The provision in Section 2143 of the Consolidation Act, that the Penal Code should have the same effect upon the Consolidation Act as if it was passed after that act, has no significance except upon the assumption that in the sense of the Legislature, the Penal Code contained provisions, which, if deemed to have been enacted after the Consolidation Act, would, or might, modify the penal clauses in that act. Moreover, it was the evident intention of the Legislature to establish by the Penal Code a uniform rule of punishment for crimes of the same grade throughout the State. It is enacted in Section 719, that an offense specified in the Code, committed after it has taken effect, "must be punished according to the provisions of this Code, and not otherwise." The claim that Section 725 was intended to apply to and preserve unimpaired all penal provisions in charter acts, is clearly disproved by Section 726. That section, which contains the only express repealing provision in the Code, is as follows: "§ 726. All acts and parts of acts which are inconsistent with the provisions of this act, are repealed so far as they impose any punishment for crime, except as herein provided." The true meaning of the phrase, "except as herein provided," would, I apprehend, have been more clearly expressed by the words, "other than as herein provided." The Consolidation Act does impose a punishment for

bribery, inconsistent with that prescribed by the Penal Code ; and Section 726, if it goes no further, clearly conforms the punishment for bribery under the Consolidation Act, to that prescribed by the Penal Code, and so to that extent affects the charter provision. In this view it is not very material whether Section 58 is regarded as wholly repealed, or only as modified in respect to the punishment. If modified only, the result would be that there are two statutes identical in substance, both as respects the definition of the crime and its punishment, under either of which an indictment would lie, a judgment under one barring proceedings under the other. But we are of opinion that Section 725 is to be construed as saving only those penal provisions of charter acts, which are not covered by the provisions of the Penal Code, and this limitation of the generality of the language of that section, is required upon construing it in connection with other provisions, and in view of the general purpose of the Legislature in enacting the Penal Code, to consolidate into one crimes act the various statutes relating to crimes, and to prescribe a uniform rule of punishment.

The main evidence produced on the trial to sustain the charge of bribery was that of a police inspector and other police officers, who testified to confessions of the defendant. It did not appear that they were made under the influence of fear produced by threats, or upon any stipulation for immunity from prosecution, so as to make them inadmissible under section 395 of the Code of Criminal Procedure. But it is claimed that there was no proof in addition to the confessions, as required by statute, to warrant a conviction. By section 395 of the Code of Criminal Procedure, it is declared that the confession of a defendant "is not sufficient to warrant a conviction, without additional proof that the crime

charged has been committed." There was evidence given on the trial, showing that the Broadway railway grant was passed under circumstances which, while they may possibly have been consistent with an innocent intention on the part of the defendant and others, nevertheless indicated the operation of unusual motives and influences, and when interpreted in the light of the confession are strongly corroborative of its truth. It is insisted that under the statute the *corpus delicti* must be proved, or evidence given tending to prove it, wholly independent of the confession, and that no evidence was given, which, disconnected with the confessions, had a legal tendency to prove the bottom of the crime. It would be a sufficient answer to this point that it is not raised by any exception on the trial, and it clearly was not raised by the exception to the denial of a motion for a new trial, made after verdict. But we are of opinion that when, in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the requirements of the statute. The words of the statute, "additional proof that the crime charged has been committed," seem to imply that the confession is to be treated as evidence of the *corpus delicti*, that is, not only of the subjective criminal act, but also the criminal agency of the defendant; in other words, as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction. "Full proof," said NELSON, Ch. J., in *People* vs. *Badgley* (16 Wend. 53, 59), "of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient." We are of opin-

ion that there was evidence in addition to the confession, which constituted "additional proof" within the statute.

We have examined the other questions raised, but have reached the conclusion that no error is disclosed in the record, and that the judgment should be affirmed. The case was carefully tried. No evidence in favor of the defendant was excluded, and none admitted against him, of doubtful competency. The charge was full and explicit upon all the points to which the attention of the Court was directed. We have been greatly aided in our examination of the case by the arguments of the respective counsel, from which nothing on either side was omitted legitimately bearing upon the questions presented.

The judgment should be affirmed.

RAPALLO, J. (dissenting). A controlling question in this case is whether the offense of which the prisoner was convicted was punishable under section 72 of the Penal Code, or under section 58 of the Consolidation Act of 1882.

Section 72 of the Penal Code provides as follows: "A judicial officer, a person who executes any of the functions of a public office not designated in titles VI and VII of the Code, or a person employed by or acting for the State, or for any public officer in the business of the State, who *asks*, *receives* or *agrees to receive a bribe*, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years or by a fine of not

more than five thousand dollars, or both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any office under the State."

This Code was passed July 26, 1881, and Section 727 declares "This act shall take effect on the first day of December, 1882. When construed in connection with other statutes, it must be deemed to have been enacted on the fourth day of January, eighteen hundred and eighty-one, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code."

The Consolidation Act was passed July 1, 1882, and is entitled "An act to consolidate into one act, and to declare the special and local laws affecting public interests in the city of New York." It contains the charter of the corporation and provides for the local government of the city. It continues the Board of Aldermen and the various departments of the city government.

Section 58, so far as relates to the question now at issue, is in the following words: "§ 58. Every person who shall promise, offer, or give, or cause or aid or abet in causing to be promised, offered or given, or furnish or agree to furnish, in whole or in part, to any other person, to be promised, offered or given to *any member of the Common Council*, or any officer of the corporation, or clerk, after his election or appointment as such officer, member or clerk, or before or after he shall have qualified and taken his seat, or entered upon his duty, any moneys, goods, right in action, or other property, or any thing of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment or action on any question, matter, cause or proceedings which may be then pending or may by law be at any time brought before him in his official or clerical capacity, shall be deemed guilty of a felony,

and shall, upon conviction, be imprisoned in a penitentiary for a term of not exceeding *two* years, or shall be fined not exceeding $5,000, or both, in the discretion of the Court.

"*Every officer in this section enumerated who shall accept any such gift or promise, or undertaking to make the same*, under any agreement or understanding that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any question, matter, cause or proceeding then or at any time pending, or which may by law be brought before him in his official capacity, shall be deemed guilty of a felony, and shall, upon conviction, be disqualified from holding any public office, trust or appointment *under the city of New York*, and shall forfeit his office, and shall be punished by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding $5,000, or both, in the discretion of the Court."

The prisoner was indicted for the crime of bribery committed by him in August, 1884, as a member of the Common Council of the City of New York. It was assumed upon the trial that one count of the indictment was framed under Section 72 of the Penal Code, and the other under Section 58 of the Consolidation Act. On the trial the Court, on motion of the counsel for the prisoner, required the District Attorney to elect upon which count of the indictment he would proceed, and thereupon the District Attorney stated that he elected to go to trial on the first count, under Section 72 of the Penal Code.

The counsel for the prisoner thereupon moved to dismiss the indictment or direct an acquittal, on the ground that no conviction could be had under that count. The motion was denied and an exception taken, and the trial proceeded.

The jury rendered a verdict of guilty. A motion in

arrest of judgment was made and denied, and the prisoner was then sentenced to be imprisoned in the State prison at hard labor for the term of nine years and ten months.

It will be observed that the Penal Code is a general statute, operative throughout the State, and that Section 72 provides for the punishment of the crime of bribery committed by any person who executes any of the functions of a public office not designated in titles 6 and 7 of the Code (which relate to State officers) and fixes the maximum punishment at imprisonment in the State prison for ten years and $5,000 fine, or both, while section 58 of the Consolidation Act is a local act, applying only to the city of New York, and relates only to a special class of officers, viz , members of the Common Council of said city, officers of the corporation and clerks, and fixes the maximum punishment for the crime, when committed by such officers, at imprisonment in the penitentiary for two years and $5,000 fine, or both.

The Penal Code, as has been stated, was passed in July, 1881, and the Consolidation Act in July, 1882. The Consolidation Act provides for the punishment of the same crime for which the prisoner was indicted; he was one of the officers specially referred to in that act, and it being the later statute in point of time, would unquestionably control where it differed from the Penal Code, and the present controversy would never have arisen but for a peculiar provision of the Consolidation Act contained in section 2143 of that act in the following language: "For the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is deemed to have been enacted on the 1st day of January, 1882. All acts passed after such date, and the Penal Code, are to

have the same effect as if they were passed after this act. This act shall take effect on the 1st day of March, 1883."

The effect of this section is the question now before us. It is claimed on the part of the prosecution that the provisions of section 58 of the Consolidation Act are inconsistent with those of section 72 of the Penal Code, and that section 2143, by declaring that the Penal Code, although in fact passed first, is to have the same effect as if passed last, operates to repeal section 58 of the Consolidation Act, and to put in its place section 72 of the Penal Code.

This argument puts the legislature in the remarkable position of carefully framing and enacting the provisions of section 58, and in the same breath and by the same act declaring that they shall have no effect whatever, but shall be deemed repealed and superseded by an act passed the previous year. Such a self-stultification cannot be attributed to the legislature if there is any rational theory upon which its enactments can be reconciled.

In the first place, it should be assumed that in giving to the Penal Code the position of the later statute, the legislature had in mind the familiar and firmly established rule for the construction of statutes, that general legislation on a particular subject must give way to special legislation on the same subject, and that laws special and local in their application are not deemed repealed or modified by general legislation on the same subject, although the terms of the general act are broad enough to include the cases embraced in the special law, unless the intent to change the local law is clearly manifested. (*In re Com'rs of Central Park*, 50 N. Y., 493; *McKenna* vs. *Edmundstone*, 91 id., 231; *People* vs. *Quigg*, 59 id., 88.)

Whatever purpose the legislature may have had in

view, therefore, in the enactment of section 2143, it is clear that it could not have intended it to operate as a repeal of section 58, for they well knew that even if the Penal Code had in fact been passed after the Consolidation Act, it would not have affected the provisions of section 58, which are special and local in their application, being applicable only to members of the Common Council and other municipal officers of the city of New York, and that to repeal those provisions, special reference to them, or some other manifestation of the intent to repeal them, than merely giving to the Penal Code the position of a later statute, was necessary. They were not, therefore, guilty of the absurdity of enacting Section 58, and inserting in the same act a provision which would prevent its operation.

But looking a little further into the subject, we find that at the time of the passage of the Penal Code, there was, and for many years had been in force, a special local statute for the punishment of bribery of members of the common council and other municipal officers of the city of New York, which differed materially from the general law on the subject of bribery, and that this special local statute was not only unaffected by the Code, but was retained in force by an express provision of the Code itself.

Prior to the adoption of the Penal Code, the general provisions of the law on the subject of bribery were contained in the Act of 1853 (Chap. 539), entitled "An Act to amend the existing laws relative to bribery," and chapter 742 of the Laws of 1869, entitled "An Act for the more effectual suppression and punishment of bribery." The Act of 1853 amended the Revised Statutes and enumerated the various officers who might commit the crime, including the Governor, State officers, members of the Legislature, Judiciary, and also members of the Common Council or corporation of any city in this

State, and imposed a maximum punishment on the offending officer of ten years imprisonment and $5,000 fine, besides forfeitnre of office and disqualification.

The Act of 1869 was more general in its terms. It did not enumerate the officers, but applied to "any person holding office under the laws of this State" who should receive or consent to receive a bribe. It imposed upon the party convicted a maximum punishment of five years imprisonment in the State prison and $5,000 fine. It omitted the punishment of forfeiture of office and disqualification from holding office, which was contained in the Revised Statutes and in the Act of 1853, and it contained this remarkable provision: "§ 2. No person who has heretofore paid or offered, or shall hereafter pay or offer, a bribe to any person holding office under the laws of this State which has been or shall be accepted in whole or in part, shall be liable to criminal prosecution therefor."

This was the general law of the State on the subject of bribery when the Penal Code was adopted, but at the same time there were in force special and local statutes on that subject applicable to members of the Common Council and other municipal officers of the city of New York and some of the othes cities of the State, which differed from the general law.

The act to amend the charter of the city of New York (Laws of 1853, Chap. 217, § 14) contained a provision substantially in the same form as section 58 of the Consolidation Act, making the acceptance of a bribe or of a promise of a bribe by any member of the Common Council or officer of the corporation, a felony, punishable by forfeiture of office and disqualification from holding office under the city, and by imprisonment in the State prison for ten years or a fine of $5,000, or both, thus conforming to the general law of 1853 on the subject of bribery.

The Charter of 1857 (Laws of 1857, Chap. 446) entitled

"An Act to amend the charter of the city of New York" (§ 52), re-enacted the foregoing provision of the Charter of 1853, but reduced the maximum punishment to two years imprisonment in the penitentiary and $5,000 fine, besides being disqualified from holding any office under the city of New York. This was the first enactment which imposed a punishment for bribery on a member of the Common Council of the city of New York different from that established by the general law.

This provision was re enacted in the Charter of 1870 (Laws of 1870, Chap. 137, § 114) and was again re-enacted in the Charter of 1873 (Laws of 1873, Chap. 335, § 100) in the same language, and was in force at the time of the passage of the Penal Code.

Thus, it will be seen that for nearly twenty-five years before the passage of the Penal Code, it had been the law, under the charters of the city of New York, that the maximum punishment which could be inflicted upon a member of the Common Council of that city for accepting a bribe was two years imprisonment in the penitentiary and $5,000 fine, and a disqualification from holding any office or public trust under the city.

The general provision in the Penal Code for the punishment of bribery did not, under the general rule for the construction of statutes before adverted to, operate to repeal or alter this local provision contained in the charter, even if the Penal Code be treated as the last enactment. It would be assumed, in conformity with that rule, that the general law was not intended to affect the local law, unless the intention that it should affect it plainly appeared. But so far from there being any appearance of any intention to repeal or alter these local charter provisions in respect to the crime of bribery the precise contrary is made manifest by section 725 of the Penal Code, which provides: "§ 725. Nothing in this Code affects *any of the provisions* of the following

statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code, except so far as they have been repealed or affected by subsequent laws." Then follows an enumeration of the laws not affected by the Code, which enumeration includes "all acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporations."

In view of this plain provision of the Code, the legislature may well have adopted section 2143 of the Consolidation Act, without deeming that by so doing they impaired any provision of the Charter of the City of New York, which was embraced in the Consolidation Act. The Penal Code was before the legislature when the Consolidation Act was passed, the Penal Code having been passed at a previous session; the difference between the punishment prescribed for bribery in that Code, and in section 100 of the Charter of 1873, and section 58 of the Consolidation Act, was plainly apparent, but at the same time it was provided that nothing in the Code should affect *any* of the *provisions* of any charter or act amending the charter of a municipal corporation. It was obvious, in view of this saving clause, that had the Code been in fact passed after the Consolidation Act, it could have had no effect upon the provisions of section 58.

It is argued that it cannot be supposed that the legislature intended to provide for the punishment of the crime of bribery in one class of officers by one measure of punishment, and that for precisely the same offense they should prescribe a different punishment for a different class of officers. It is indeed difficult to assign a reason for making the distinction, and especially for making the punishment for bribery comparatively so light in respect to members of the Common Council of the City of New York, when the magnitude of the in-

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THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

*vs.*

JOHN O'NEIL,
Appellant.

(Argued March 21, 1888 ; decided April 10, 1888.)

ANDREWS, J.:

In the case of The People *against* Jaehne, 103 N. Y., 182: "It was held that the crime of bribery committed by a member of the Common Council of the City of New York, subsequent to December 1, 1882, was punishable under Section 72 of the Penal Code. This construction necessarily involved the conclusion that Section 100 of the Charter of 1873, in force prior to December 1, 1882, being the bribery section of the charter, was repealed by the taking effect on that day of the Penal Code, so far as it was in conflict with any of the provisions of Section 72. That section increased the punishment for bribery beyond that prescribed by the Charter of 1873, and could therefore only operate upon the crime of bribery committed by a member of the Common Council after the Penal Code took effect. Section 72 is not retrospective in its terms, and according to settled principles is to be construed as prospective only. If a case should arise where the bribery charged was committed while Section 100 of the Charter of 1873 was in force, it would be necessary to consider whether such cases were reserved from the operation of the Penal Code. The alternative conclusion would be that the Legislature, in repealing Section 100 of the Charter by the enactment of

the Penal Code, had inadvertently omitted to except, from the operation of the repealing statute, cases of bribery committed by municipal officers of New York prior to its enactment. It will be time enough to consider the application and effect of the Penal Code upon such cases when occasion arises. Whatever conclusion might be reached on this point, Section 72 of the Penal Code was in no sense an *ex post facto* law. It was a law governing future cases only, and even if it purported to enact a rule applicable to past as well as future transactions, it would be void as to the former only. The cases are separable, and it is not the rule that the whole statute falls because one part is unconstitutional and void, unless the void part is so interwoven with the valid part that the parts cannot be separated and the valid part sustained by itself without defeating the intention of the Legislature. The difficult question in the Jaehne case was as to the effect of the Consolidation Act, which took effect March 1, 1883, after the enactment of the Penal Code. The Penal Code, as was held, repealed Section 100 of the Charter of 1873, and Section 72 became the law for the punishment of bribery as well in the city of New York as elsewhere in the State. But Section 100 was re-enacted as Section 58 of the Consolidation Act. The question was whether the section of the Consolidation Act—a later enactment than the Penal Code—did not restore the definition and punishment of bribery as declared originally in Section 100 of the Charter of 1873, and in turn repeal Section 72 of the Penal Code as applied to the city of New York, as the Penal Code had repealed the provision in the Charter of 1873. The Court decided that this result was prevented by Section 2143 of the Consolidation Act, which declared, in substance, that the Penal Code, for the purpose of construing the effect of the two acts, should be deemed the later enactment. The supposed incongruity of the

Legislature in inserting in the Consolidation Act, Section 58, and then at the same moment making it subject to the Penal Code, thereby superseding it, is more apparent than real. The Consolidation Act was primarily designed to bring together the local laws relating to the city of New York, the crimes provisions as well as others; but, to avoid conflict with the Penal Code, the crimes provisions in the Consolidation Act were, in effect, subordinated to the provisions of the Penal Code. It was a precautionary policy and relieved the authors of the Consolidation Act and the Legislature from the necessity of the careful comparison of the provisions of the two statutes to ascertain whether they were in any respect in conflict. The suggestion that Section 2143 is in violation of Section 16, Article 3, of the Constitution, is without force. The section is germane to the title of the act, and is not the introduction of a new subject not within the purview of the act. We perceive no reason in the new suggestions of counsel for changing our conclusion in the Jaehne case on the principal point there considered.

"There are many questions which have been presented on the argument here in behalf of the appellant arising on exceptions from the trial. They have been fully considered in the able opinion of Judge Van Brunt (10 N. Y. S. C. R. 1). We concur in the conclusions of the General Term, and shall confine ourselves to a brief reference to some of the questions pressed on our attention."

The remainder of the decision has reference to the competency of testimony under the objections raised and exceptions taken by defendant's counsel, and to the charge of the Judge, which were overruled by the Court.

"We find," says the Court, in conclusion, "no error in the record, and the judgment should therefore be affirmed."

Article III of the Constitution of the State of New York, adopted November 3, 1846, 1 Revised Statutes of New York, 7th ed., Banks & Bros., p. 68:

"SECTION 16. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Revised Statutes of New York, passed during the years 1827 and 1828, part 4. title 4, chap. 1, article 2, 1st ed., vol. 2, p. 682:

"Of bribery and corrupting jurors and others."

"SECTION 9. Every person who shall promise, offer or give to the Governor or Lieutenant-Governor, or to any member of the Senate or Assembly of this State, after his election as such member, and either before or after he shall have qualified and taken his seat; to any Commissioner of the Land Office, or of the Canal Fund, or any Canal Commissioner; to the Comptroller, Surveyor-General, Secretary of State or Attorney-General; to any Judge of any Court of Record, or to any judicial officer whatever, any money, goods, right in action or other property, with intent to influence his vote, opinion or judgment on any question, matter, cause or proceeding, which may be then pending. or may by law be brought before him in his official capacity, shall, upon conviction, be imprisoned in a State prison not exceeding ten years, or shall be fined not exceeding five thousand dollars, or both, in the discretion of the Court.

"SECTION 10. Every officer in the last section enumerated, who shall accept any such gift, or any promise or undertaking to make the same, under any agreement that his vote, opinion or judgment shall be given in any particular manner, or upon any particular side of any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity, shall, upon conviction, be forever disqualified from holding any public office, trust or appointment

under the constitution or laws of this State, shall forfeit his office and shall be punished by imprisonment in the State prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court."

Laws of 1853, chap. 539, p. 1011, "An act to amend the existing law relating to bribery," passed July 18, 1853:

"SECTION 1. The ninth and tenth sections in article 2 of title 4, chap. 1, part 4, of the Revised Statutes of this State, which article is entitled 'Of bribery and corrupting jurors and others,' are hereby so amended as to read as follows:

"SECTION 9. Every person who shall promise, offer or give, or cause, or aid, or abet in causing to be promised, offered or given, or furnish, or agree to furnish, in whole or in part, to the Governor, or Lieutenant-Governor, or to any member of the Senate or Assembly of this State, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any clerk or other officer of the Senate or Assembly; to any Commissioner of the Land Office, or of the Canal Fund, or any Canal Commissioner, or Canal Appraiser; to the Comptroller, Surveyor-General, State Engineer and Surveyor, Secretary of State, Attorney-General or Superintendent of the banking department; to any Judge of any Court of Record, or to any judicial officer whatever; *to any member of the Common Council, or corporation of any city in this State*, or to any mayor, recorder, chamberlain, treasurer or comptroller of such city, or to any other officer of such city, or of any department of the government thereof; any money, goods, right in action, or other property, or anything of value, or any pecuniary or other individual advantage, present or prospective, with intent to influence his vote, opinion, judgment or action upon any question, matter, cause or

proceeding, which may be then pending, or may by law be brought before him in his official capacity, shall, upon conviction, be imprisoned in a State prison not exceeding ten years, or shall be fined not exceeding five thousand dollars, or both, in the discretion of the Court."

"SECTION 10. Every officer, in the last section enumerated, who shall accept any such gift, thing of value or advantage, or any promise or undertaking to make or furnish the same, under any agreement or understanding that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity, or who shall, directly or indirectly, demand, require, propose to receive, receive or entertain any negotiation or proposition for any such gift, thing of value or advantage, as a consideration or motive for his official vote, action or influence, shall, upon conviction, be forever disqualified from holding any public office, trust or appointment, under the constitution or laws of this State, shall forfeit his office, and shall be punished by imprisonment in a State prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court."

Laws of 1857, Ch. 446, pp. 874, 893, "An Act to amend the charter of the city of New York," passed April 14, 1857:

"SECTION 52. Every person who shall promise, offer or give, or cause, or aid, or abet, in causing to be promised, offered or given, or furnish, or agree to furnish, in whole or in part, to be promised, offered or given to any *member of the Common Council*, or any officer of the corporation, after his election as such

member, or before or after he shall have qualified and taken his seat, any money, goods or right in action, or other property, or anything of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment or action on any question, matter, cause or proceeding which may be then pending, or may, by law, be brought before him in his official capacity, shall, upon conviction, be imprisoned in a penitentiary for a term not exceeding two years, or shall be fined not exceeding five thousand dollars, or both, in the discretion of the Court. Every officer in this section enumerated, who shall accept any such gift or promise, or undertaking, to make the same, under any agreement or undertaking that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity, shall, upon conviction, be disqualified from holding any public office, trust or appointment under the Charter of the city of New York, and shall forfeit his office, and shall be punished by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court. Every person offending against either of the provisions of this section shall be a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence before any Grand Jury, or in any Court, in the same manner as other persons, but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying."

Laws of 1869, Ch. 742 (misprinted in brief, Ch. 747), vol. 2, p. 1793:

"An act for the more effectual suppression and punishment of bribery," passed May 8, 1869.

"SECTION 1. Any person holding office under the laws of this State, who, except in payment of his legal salary, fees or perquisites, shall receive or consent to receive, directly or indirectly, anything of value, or of personal advantage, on the promise thereof, for performing or omitting to perform, any official act, with the express or implied understanding on his part that his official action or omission to act, is to be in any degree influenced thereby, shall be deemed guilty of a felony, and, on conviction, shall be punished by imprisonment in a State prison for a term not exceeding five years or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court."

Laws of 1870, Chap. 137, Vol. 1, pp. 366, 394: "An act to reorganize the local government of the city of New York," passed April 5, 1870: "Sec. 114. Every person who shall promise, offer or give, or cause, or aid or abet in causing to be promised, offered or given, or furnish, or agree to furnish, in whole or in part, to be promised, offered or given to any *member of the Common Counsel*, or any officer of the corporation, after his election as such member, or before or after he shall have qualified and taken his seat, any moneys, goods, right in action, or other property, or anything of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment or action on any question, matter, cause or proceeding which may be then pending, or may by law be brought before him in his official capacity, shall, upon conviction, be imprisoned in a penitentiary for a term not exceeding two years, or shall be fined not exceeding five thousand dollars, or both, in the discretion of the Court. Every officer in this section enumerated, who shall accept any such gift or promise, or undertaking to make the same

under any agreement or understanding that his vote' opinion, judgment or action, shall be influenced thereby, or shall be given in any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity, shall, upon conviction, be disqualified from holding any public office, trust or appointment under the city of New York, and shall forfeit his office, and shall be punished by imprisonment in the penitentiary, not exceeding two years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court.

"Every person offending against either of the provisions of this section shall be a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence before any grand jury, or in any Court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying."

Laws of 1873, Ch. 335, pp. 484, 510:

"An act to reorganize the local government of the city of New York," passed April 20, 1873.

"SECTION 100. Every person who shall promise, offer or give, or cause, or aid, or abet in causing to be promised, offered, or given, or furnish, or agree to furnish, in whole or in part, to any other person, to be promised, offered, or given to any *member of the Common Council*, or any officers of the corporation, or clerk, after his election or appointment as such officer, member or clerk, or before or after he shall have qualified and taken his seat, or entered upon his duty, any moneys, goods, right in action, or other property, or anything of value, or any pecuniary advantage, present or prospective, with intent to influence his vote, opinion, judgment or action on any question, matter, cause

or proceedings which may be then pending, or may by law be at any time brought before him in his official or clerical capacity, shall be deemed guilty of a felony, and shall, upon conviction, be imprisoned in a penitentiary for a term not exceeding two years, or shall be fined not exceeding five thousand dollars, or both, in the discretion of the Court.

"Every officer in this section enumerated, who shall accept any such gift or promise, or undertaking to make the same under any agreement or understanding that his vote, opinion, judgment or action, shall be influenced thereby, or shall be given in any question, matter, cause, or proceeding then, or at any time pending, or which may by law be brought before him in his official capacity, shall be deemed guilty of a felony, and shall, upon conviction, be disqualified from holding any public office, trust or appointment under the city of New York, and shall forfeit his office, and shall be punished by imprisonment in the penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court.

"Every person offending against either of the provisions of this section shall be a competent witness against any other person offending in the same transaction, and may be compelled to appear and give evidence before any Grand Jury, or in any Court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying."

Laws of 1879, Ch. 536, p. 596: "An act to provide for a compilation and revision of the laws of the State of New York affecting public interests in the city of New York," passed June 20, 1879.

"SECTION 1. Within twenty days after the passage of this act the counsel to the corporation of the city of New York shall appoint two persons, who, together

with the said counsel to the corporation, shall constitute and form a commission to compile and revise all the special or local laws affecting public interests in the city of New York which shall be in force at the time such commissioners make their final report." * * *

"SECTION 2. When the said commissioners shall have completed the compilation and revision of the statutes as aforesaid they shall cause a copy of the same to be submitted to the legislature for the year 1880, and at the same time they shall suggest to the legislature such contradictions, omissions and imperfections as may appear in the original text, with their recommendations for amendment, either by a repeal or by explanatory or supplementary legislation, with their reasons for such recommendations."

Laws of 1880, Chap. 594, vol. 1, p. 887:

"An act to provide for the revision of the special and local laws affecting public interest in the city of New York," passed June 26, 1880.

It was enacted that within twenty days after the passage of this act, the Counsel to the Corporation of the city of New York shall appoint two persons, who, together with himself, shall constitute a commission to revise all the special or local laws affecting public interests in the city of New York which shall be in force at the time such commissioners shall make their final report, or at such time prior thereto as said commissioners shall find advisable. * * * That copies shall be distributed to those whose advice is desirable, and thereafter the revision shall be submitted to the Legislature.

Laws of 1880, Chap. 595, vol. 1, p. 888.

"An act to authorize the reading in Courts and Special proceedings of the compilation entitled 'The special and local laws affecting public interest in the city of

New York and to declare the effect thereof," passed June 26, 1880.

It was enacted that the volume so entitled may be read in evidence and cited in any Court or proceeding as containing presumptively all special or local laws affecting public interest in force in the city of New York, January 1, 1880.

Laws of 1881, Chap. 676, vol. 3: "An act to establish a Penal Code," passed July 26, 1881.

"SEC. 2. No act or omission begun after the beginning of the day on which this Code takes effect as a law shall be deemed criminal or punishable, except as prescribed or authorized by this Code, or by some statute of this State not repealed by it. Any act or omission begun prior to that day may be inquired of, prosecuted and punished in the same manner as if this Code had not been passed."

"SEC. 72. A judicial officer, a person who executes any of the functions of a public office not designated in Titles VI and VII of this Code, or a person employed by or acting for the State, or for any public officer in the business of the State, who asks, receives or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years or by fine of not more than five thousand dollars, or both. A conviction also forfeits any office held by the offender and forever disqualifies him from holding any public office under the State."

"SEC. 702. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for

a term less than one year, the imprisonment must be inflicted by confinement in the county jail or place of confinement designated by law to be used as the jail of the county, except when otherwise specially prescribed by statute."

"SEC. 703. Where a person is convicted of a crime, for which the punishment inflicted is imprisonment for a term of one year, he may be sentenced to, and the imprisonment may be inflicted by, confinement either in a county jail or in a penitentiary or State prison. No person shall be sentenced to imprisonment in a State prison for less than one year."

"SEC. 704. Where a person is convicted of a fine, for which the punishment inflicted is imprisonment for a term exceeding one year, or is sentenced to imprisonment for such a term, the imprisonment must be inflicted by confinement at hard labor in a State prison.

"But this and the two last sections shall not apply to a case where special provision is made by statute as to the punishment for any particular offense or class of offenses or offenders, nor to the cases specified in sections 698, 699, 700 and 701."

"SEC. 719. Nothing contained in any provision of this Code applies to an offence committed or other act done at any time before the day when this Code takes effect. Such an offence must be punished according to, and such act must be governed by, the provisions of law existing when it is done or committed, in the same manner as if this Code had not been passed; except that, whenever the punishment or penalty for an offence is mitigated by any provision of this Code, such provision may be applied to any sentence or judgment imposed for the offence after this Code takes effect. An offence specified in this Code, committed after the beginning of the day when this Code takes effect, must be punished

according to the provisions of this Code, and not otherwise."

"SEC. 724. This Code does not affect any power conferred by law upon any court-martial or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal or officers, to impose or inflict punishment for a contempt; nor any provisions of the laws relating to apprentices, bastards, disorderly persons, Indians and vagrants, except so far as any provisions therein are inconsistent with this Code."

"SEC. 725. Nothing in this Code affects any of the provisions of the following statutes; but such statutes are recognized as continuing in force, notwithstanding the provisions of this Code; except so far as they have been repealed or affected by subsequent laws:

"1. All acts incorporating municipal corporations, and acts amending acts of incorporation or charters of such corporation, or providing for the election or appointment of officers therein, or defining the powers or duties of such officers.

"2. All acts relating to emigrants or other passengers in vessels coming from foreign countries, except as provided in Section 626 of this Code.

"3. All acts for the punishment of intoxication or th suppression of intemperance, or regulating the sale or disposition of intoxicating or spirituous liquors.

"4. All acts defining and providing for the punishment of offences, and not defined and made punishable by this Code."

"SEC. 726. All acts and parts of acts which are inconsistent with the provisions of this act are repealed, so far as they impose any punishment for crime, except as herein provided."

"SEC. 727. This act shall take effect on the first day of December, 1882. When construed in connection with other statutes, it must be deemed to have been enacted on the 4th day of January, 1881, so that any statute enacted after that day is to have the same effect as if it had been enacted after this Code."

Laws of 1882, Chap. 410, Vol. 2: "An Act to consolidate into one act, and to declare the special and local laws affecting public interests in the city of New York," passed July 1, 1882.

"SEC. 58. This section is identical with Section 100 of Chapter 335, Laws of 1873, *supra*."

"SEC. 2143. This act shall not affect any offense committed or right of removal accrued prior to the time when it takes effect, and all penalties and forfeitures incurred under any statute superseded or repealed by this act prior to the time when it takes effect, may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed. Nor shall this act affect any right accrued or acquired prior to the time when it takes effect, nor create a vacancy in any office or employment."

"SEC. 118 * * * * * * and 1779 of this Act being intended only to contain the substance of certain sections of the Code of Civil Procedure or of the Code of Criminal Procedure, or of amendments thereof, shall not be construed as making any new enactment, or as repealing, modifying, amending, or superseding any provision of either of said Codes, or any amendments thereof, but shall be treated and considered as embraced in this act solely in order that it may contain all provisions of existing laws which are of special application in the city of New York. Sections 1371 * * * to 1650, inclusive, shall in like manner be treated and considered as making no new

enactment, but as embraced in this act for the same reason.

"*For the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is deemed to have been enacted on the 1st day of January, 1882; all acts passed after such date and the Penal Code are to have the same effect as if they were passed after this act. This act shall take effect on the 1st day of March, 1883.*"

This act may be cited as the New York City Consolidation Act of 1882.

Laws of 1883, Chap. 67, p. 50: "An act to amend Chap. 410 of the Laws of 1882, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York,'" passed February 28, 1883.

"SEC. 1. Section 2143 of Chapter 410 of the Laws of 1882, entitled * * * is hereby amended so as to read as follows:"

No change is made except to substitute "the 1st day of April, 1883," for "the 1st day of March, 1883."

Laws of 1883, Chap. 298, pp. 348, 408: "An act to provide for the government of the 'City of Albany,'" passed April 23, 1883.

"Title XVIII, § 6. Every member of the Common council or officer of the City of Albany, who shall accept any gift or promise, or undertaking to make the same, under any agreement or understanding that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any question, matter, cause or proceeding then pending or which may by law be brought before him in his official capacity, shall, upon conviction, be disqualified from holding any public office, trust or appointment under the City of Albany, and shall forfeit his office, and shall be punished by im-

prisonment in the penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, in the discretion of the Court."

Laws of 1886, Chap. 31, p. 41:

"An act to Amend the Penal Code," passed March 3, 1886.

"SEC. 8. Add a new section to such Penal Code to read as follows:

"SEC. 728. No provision of this Code or any part thereof shall be deemed repealed, altered or amended by the passage of any subsequent statute inconsistent therewith, unless such statute shall explicitly refer thereto and directly repeal, alter or amend this Code accordingly."

"SEC. 9. This act shall take effect immediately."

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NOTE.—The report of the Commissioners of the Penal Code, referred to in appellant's brief, was made December 4, 1864. Albany: Weed, Parsons & Co., 1865. See Law Department Congressional Library.

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CLERK.

# SUPREME COURT OF THE UNITED STATES.

HENRY W. JAEHNE, APPELLANT,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,
APPELLEES.

# BRIEF AND POINTS FOR APPELLEES.

JOHN R. FELLOWS,
*District Attorney*
*of the County of New York.*

# Supreme Court of the United States.

HENRY W. JAEHNE,
Appellant.

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees.

## STATEMENT.

This is an appeal by Henry W. Jaehne from an order entered in the Circuit Court of the United States, for the Southern District of New York, on the first day of October, 1888, denying the prayer of his certain petition filed in said Circuit Court on the 17th day of May, 1888.

The petition charged that the said petitioner, Henry W. Jaehne, was deprived of his liberty and held in custody in violation of the Constitution of the United States, by one Augustus A. Brush, Warden of the State Prison of the State of New York, at Sing Sing in the Southern District of New York, and prayed for a writ of habeas corpus to said Augustus A. Brush, requiring him to produce the body of said petitioner for the purpose of inquiring into the legality of his detention. The petition also prayed for an auxiliary writ of certiorari.

In said petition it is alleged as entitling the petitioner to the relief prayed for, that on the day of May, 1886, at a term of the Court of Oyer and Terminer, holden in and for the City and County of New York in the State of New York, the said petitioner was convicted by verdict of a jury of the crime of bribery committed as a member of the Common Council of the City of New York, and that thereafter on the 20th day of May, 1886, for the crime aforesaid whereof he had thus been convicted, he was sentenced by said Court of Oyer and Terminer to be imprisoned in said State Prison for the term of nine years and ten months, and that he entered upon such imprisonment on the

21st day of May, 1886, by virtue of a warrant of commitment, a copy of which is annexed to the said petition; that the maximum imprisonment which could be lawfully imposed by any valid provision of the State of New York as punishment for the crime of which he had been convicted was two years in the Penitentiary, that making the deduction of four months to which he was entitled for good behavior he had served the full term of imprisonment which could lawfully be imposed as punishment for the said crime of which he had been convicted, that the only authority of law for his further detention for the balance of the term of imprisonment to which he had been sentenced as aforesaid was a provision of statute of the State of New York passed July 1st, 1882, and known as the Consolidation Act and especially section 2143 of said Consolidation Act, that this provision of statute was *ex post facto* within the meaning of the Constitution of the United States in that by virtue and force thereof the provisions of the Penal Code of the State of New York thereto fore and otherwise not applicable to crimes of bribery committed by members of the Common Council of the City of New York, were made to apply to crimes of bribery committed by members of the Common Council of the City of New York, and that thereby all such crimes, those committed before as well as those committed after the Consolidation Act went into operation and effect, were made punishable indifferently and indistinguishably by a maximum penalty of [redacted] years in State Prison, that being the maximum penalty of imprisonment denounced by the Penal Code applicable to crimes of bribery, whereas before that act, namely the Consolidation Act, went into operation and effect and made the Penal Code applicable to crimes of bribery committed by members of the Common Council of the City of New York, such crimes of bribery committed by members of a Common Council of the City of New York were punishable by a maximum penalty of two years in the Penitentiary.

The petition then alleges that forasmuch as the said provision of law, being the only authority of law for the petitioner's further detention in prison, is thus *ex post facto* within the meaning of the Constitution of the United States, such further detention is in violation of the Constitution of the United States and that he is therefore entitled to be discharged on writ of habeas corpus.

Upon the presentation and filing of this petition in the said Circuit Court, an order was made and entered therein requiring the District Attorney of the County of New York to show cause before said Circuit Court, on the 25th day of May, 1888, why a writ of habeas corpus and a writ of certiorari should not be issued, pursuant to the prayer of the said petition. And thereafter, to wit, on the 1st day of October, 1888, after hearing counsel in support of said petition, and the District Attorney of the County of New York, in opposition thereto, the prayer of the said petition was denied and an order to that effect entered in said Circuit Court. From this order of the said Circuit Court this appeal was allowed and taken.

The Penal Code of the State of New York was enacted the 26th day of July, 1881, and took effect and went into operation and law on the 1st day of December, 1882.

"The Penal Code, as its title implies, is an institute of criminal justice of general application, and was enacted in harmony with the tendency of recent legislation for the purpose of embodying in a single statute the system of criminal law applicable to the State, and substituting the statutes so enacted in place of the great number of statutes and amendments to statutes, which together, before the enactment of the Code, constituted the body of the criminal law."

People *v.* Jaehne, 103 N. Y., pp. 192 and 193 of opinion.

The Consolidation Act, which was designed to bring together the local laws relating to the city of New York, was passed the 1st day of July, 1882, but did not go into operation and effect until the 1st day of April, 1883 (Chapter 67, Laws 1883).

Section 72 of the Penal Code reads as follows:

"*A judicial officer, a person who executes any of the functions of a public office not designated in Titles six and seven of this Code, or a person employed by or acting for the State, or for any public officer in the business of the State, who asks, receives, or agrees to receive a bribe, or any money, property or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceedings shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years or by a fine of not more than five thousand dollars or both. A conviction also forfeits any office held by the offender and forever disqualifies him from holding any public office under the State.*"

Section 2143 of the Consolidation Act provides as follows:

" * * * * * * * * * * *

"*For the purpose of determining the effect of this act upon other acts, except the Penal Code, and the effect of other acts, except the Penal Code, upon this act, this act is deemed to have been enacted on the first day of January, in the year eighteen hundred and eighty-two; all acts passed after such date and the Penal Code are to have the same effect as if they were passed after this act. This act shall take effect on*

*"the first day of April, eighteen hundred and eighty-three.*
*"This act may be cited as the New York City Consolidation Act*
*"of eighteen hundred and eighty-two."*

*The crime for which the appellant was sentenced and is now undergoing imprisonment as aforesaid was committed in the year 1884 after both the Consolidation Act and the Penal Code were passed and went into effect.*

## POINTS.

### I.

**The claim of the petition that between the first day of December, 1882, when the Penal Code took effect, and the first day of April, 1883, when the Consolidation Act took effect, the Penal Code was not applicable to crimes of bribery committed by members of the Common Council of the city of New York, is false and unfounded.**

The only argument in support of this claim is that Section 100, Chapter 335, of the Laws of 1873 had ever since its passage been the law applicable to crimes of bribery committed by members of the Common Council of the city of New York, and that, being a charter provision of the city or New York said section 100, Chapter 335, Laws 1873, was by section 725 of the Penal Code expressly excepted from the operation of the repealing clause of the Penal Code, and continued in force and effect until the Consolidation Act went into operation and effect when it was repealed by Section 58 of the Consolidation Act.

A conclusive answer to this argument is that it has been held by the Court of Appeals of the State of New York that section 100, Chapter 335, Laws of 1873, is not within the saving clause of Section 725 of the Penal Code, but on the contrary was repealed by the Penal Code as soon as it went into operation and effect on the first day of December, 1882.

People *v.* O'Neil, 109 N. Y., p. 261 of opinion.

The decision in the O'Neil case followed the decision of the same Court in

People *v.* Jaehne, 103 N. Y., p. 102.

That this was really the *principium decidendi* in the Jaehne case is evident from the following brief extracts from the opinion of the Court.

"*It is inconceivable that a bribery statute of general application should be enacted which did not embrace bribery of municipal officers. We find no difficulty in reaching the conclusion that Section 72 of the Penal Code applies in general to the offense of bribery committed by municipal officers.*"

* * * * * * * *

"*It is impossible to suppose that the legislature when it enacted the Penal Code intended to exempt officials in the city of New York from the operation of the bribery sections. No public policy can be assigned for such a discrimination, and we think the case is within the rule that 'a later statute covering the same subject matter and embracing new provisions operates to repeal the prior act although the two acts are not in express terms repugnant.'*"

* * * * * * * *

"*The claim is that this section excepts from the operation of the Penal Code* all penal provisions in charter acts, *and as Section 58, of the Consolidation Act—(which is but a transcript of Section 100, Chap. 335, Laws of 1873)—is a penal provision of that character it is excepted from the operation of the Penal Code. Notwithstanding the generality of the language of Section 725, it is apparent from other provisions, both of the Consolidation Act and of the Penal Code, that it was not intended that all penal provisions in charter acts should remain in force unaffected by the Penal Code.*"

* * * * * * * *

"*But we are of the opinion that Section 725 is to be construed as saving only those penal provisions of charter acts which are not covered by the provisions of the Penal Code, and this limitation of the generality of the language of that section is required, upon construing it in connection with other provisions, and in view of the general purpose of the legislature in enacting the Penal Code, to consolidate into one crimes act the various statutes relating to crimes and to prescribe a uniform rule of punishment.*"

These decisions of the Court of Appeals of the State of New York to the effect that said Section 100, Chapter 335, of the Laws of 1873, was repealed by the unaided force and effect of the Penal Code as soon as it went into operation on the 1st day of December, 1882, is of course binding and conclusive upon the Federal courts.

The appellant's assumption that Section 100, Chapter 335, Laws 1873, was not repealed by the Penal Code and remained in force during the interval of time between the 1st day of December, 1882, when the Penal Code took effect, and the 1st day of April, 1883, when the Consolidation Act took effect, is therefore false.

The assumption upon which the appellant's argument rests being thus false and gratuitous the prop which supports it is withdrawn, the argument falls to the ground and thus is made manifest the falsity of the claim the argument was advanced to support that between the 1st day of December, 1882, when the Penal Code took effect, and the 1st day of April, 1883, when the Consolidation Act took effect, the Penal Code was not applicable to crimes of bribery committed by members of the Common Council of the city of New York.

If the Penal Code thus became applicable from and after the 1st day of December, 1882, when it took effect, to crimes of bribery committed by members of the Common Council of the city of New York, it was not by virtue of any retroactive force and effect of the Consolidation Act which did not take effect until four months thereafter, and there is therefore no foundation whatever for the claim that the Penal Code cannot be made applicable to such crimes of bribery without rendering it *ex post facto* in its operation.

## II.

**But even if the Penal Code were as claimed by the appellant ex post facto in its operation as to crimes of bribery committed by members of the Common Council of the City of New York before the Consolidation Act took effect, it does not by any means follow that for that reason the Penal Code is to be deemed ex post facto in its operation as to such crimes committed, as was the crime of the appellant, in the year 1884, long after both the Penal Code and the Consolidation Act went into operation and effect.**

This precise point was decided by the Court of Appeals of the State of New York in the case of

People *v.* O'Neil, 109 N. Y., p. 251.

The doctrine is indeed too well settled to admit of serious question.

Cooley on Constitutional Limitations (5th ed.), pp. 215 and 216.

There the doctrine is thus stated:

"*A legislative act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not effect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which, therefore, would have no legal force except such as the law itself would allow. In such case the unconstitutional law must operate as far as it can and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.*"

In support of these views, the author cites a number of cases, including the case of

Tiernan *v.* Rinker, 102 U. S., 123.

It is therefore submitted that the provisions of law under which the appellant was sentenced and imprisoned, as aforesaid, for the crime aforesaid, committed in the year 1884, cannot be deemed in any respect or to any extent *ex post facto* in their operation as to such crime.

## III.

In support of the decision of the lower Court, Mr. Justice Benedict, who presided therein, at the hearing upon the appellant's petition, delivered an opinion the reasoning of which is conclusive upon the question as to the propriety of the decision. The opinion is short, and is as follows:

### UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of the Petition
of
HENRY W. JAEHNE for a writ of
*Habeas Corpus.*

JUNE 11, 1888.

BENEDICT, *J.:*

"This is an application for a writ of *habeas corpus* to bring "before this Court Henry W. Jaehne for the purpose of inquir- "ing as to the legality of his detention in the State Prison where "he is confined under a sentence of the Supreme Court of the "State of New York.

"The Petitioner was indicted and convicted under the pro- "visions of Section 72 of the Penal Code of New York. Pur- "suant to that provision of statute he was sentenced to be im- "prisoned in the State Prison for the term of nine years and ten "months, two years of which term have already expired. The "application for relief from that judgment at the hands of this "Court is based upon the proposition that Section 72 of the "Penal Code, with the force and effect given it by Section 2143 "of the Consolidation Act under the decision of the Court of "Appeals is an *ex post facto* law and therefore void because "contrary to the Constitution of the United States. In con- "sidering this proposition it is to be observed that the question "so earnestly discussed in behalf of the prisoner, whether Sec- "tion 58 of the Consolidation Act was made of no effect and "Section 72 of the Penal Code by Section 2143 of the Consolida- "tion Act was made the law in cases of Aldermanic bribery in

"the city of New York is not presented for the decision of this "Court by this application. The Petitioner is not imprisoned "by virtue of Section 58 of the Consolidation Act, but by virtue "of Section 72 of the Penal Code. The power of this Court to "relieve him of imprisonment therefore depends upon the valid- "ity of Section 72 of the Penal Code as given effect by the Court "of Appeals. If that provision of the statute of the State be "valid the prisoner cannot be released by this Court whatever "may be the opinion of this Court as to the correctness of the "conclusion of the Court of Appeals that the law applicable to "the prisoner's case was to be found in Section 72 of the Penal "Code and not in Section 58 of the Consolidation Act. It is "thus apparent that the question presented to this Court by "the present application relates to Section 72 of the Penal Code "and to that alone. In determining the validity of that section "any construction given to it by the Court of Appeals is con- "trolling and the decision of the Court of Appeals in O'Neil's "case where the indictment was under the same statute must "therefore be observed.

"In that case the Court of Appeals declared that Section 72 "of the Penal Code was to be construed as prospective only in "its operation. This construction put upon a statute of the "State by the highest Court of the State in the only case where "the precise question has been distinctly presented must be "followed by this Court upon this occasion under the familiar "rule that the construction of a State statute adopted by the "highest Court of the State is regarded as part of the statute by "the National Courts. It may be added that if the question "whether Section 72 of the Penal Code was prospective in its "operation were open to decision here, no ground is discovered "upon which to reject the construction adopted by the Court of "Appeals in view of the positive language of the Penal Code.

"Following that construction, and holding as I am bound to "hold, that the statute under which the prisoner is confined is "prospective only in its operation, the question presented by the "Petitioner is reduced to this, namely: whether a statute in "force at the time the offense was committed which increases "the punishment of that crime but is prospective alone in its "operation is an *ex post facto* law. On that ground there is "nothing to be said.

"Motion for a writ of habeas corpus is denied."

## IV.

**The order appealed from should be affirmed.**

Respectfully submitted,

JOHN R. FELLOWS,
District Attorney
of the County of New York.

McKenzie Semple